

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**MacDERMID PRINTING SOLUTIONS,
L.L.C.,**

Plaintiff,

-vs-

**E.I. DuPONT DeNEMOURS AND
COMPANY,**

Defendant.

CIVIL ACTION NUMBER:

3:07-cv-07-4325

**MOTION FOR SUMMARY
JUDGMENT**

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
April 16, 2013

B E F O R E:

**THE HONORABLE MARY L. COOPER
UNITED STATES DISTRICT JUDGE**

A P P E A R A N C E S:

CARMODY & TORRANCE

BY: JOHN R. HORVACK, JR., ESQUIRE
And

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Certified as True and Correct as required by Title 28,
U.S.C., Section 753

/S/ Regina A. Berenato-Tell, RMR, CRR, CCR

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1 TRENTON, NEW JERSEY WEDNESDAY, APRIL 16, 2013 2:10 P.M.

2 (Call to order of the Court.)

3 THE COURT: Good afternoon, everyone.

4 We're here today on MacDermid versus DuPont, number
5 07-4325. I know you have given your appearances to the
6 deputy, but you may state them for the record now.

7 MR. ROBINSON: Yes. For MacDermid, local counsel,
8 Don Robinson.

9 MR. HORVACK: And John Horvack for Carmody and
10 Torrance for MacDermid.

11 MS. O'REILLY: Good afternoon, Your Honor. Tricia
12 O'Reilly from Connell Foley on behalf of DuPont.

13 MR. OSSOLA: Good afternoon, Your Honor. Charles
14 Ossola with Vinson and Elkins on behalf of DuPont.

15 MR. ALLEN: And Andrew Allen with Vinson and Elkins
16 on behalf of DuPont.

17 THE COURT: All right. Thank you.

18 This is DuPont's motion limited to its contention
19 that the '835 patent is invalid based upon prior on sale and
20 on use -- in use facts that DuPont offers. Right?

21 MR. OSSOLA: Yes. Yes, Your Honor.

22 THE COURT: So would you like to proceed, Mr. Ossola?

23 MR. OSSOLA: Your Honor, may I hand up to the Court
24 two copies of the presentation. I have already given copies
25 to Mr. Horvack and Mr. Robinson.

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1 THE COURT: Thank you.

2 I wanted to have a word with my law clerk for a second.

3 Thank you. Okay. Go ahead.

4 MR. OSSOLA: All right. Good afternoon, Your Honor.

5 This is Charles Ossola on behalf of DuPont, and I'm here to
6 present argument on DuPont's motion for summary judgment of
7 invalidity of U.S. patent RE39,835.

8 THE COURT: One question has occurred to me as I have
9 been travelling through this motion, which is: You had some
10 other summary judgment motions that were filed, and then there
11 were some discovery disputes or motions to strike, rather --

12 MR. OSSOLA: Yes.

13 THE COURT: -- and, so, we terminated those other
14 summary judgment motions, obviously, intending that you would
15 be back with those if you saw fit once you took care of things
16 with the Magistrate Judge. Are any of those motions coming
17 back at us?

18 MR. OSSOLA: Yes, Your Honor.

19 THE COURT: Which ones?

20 MR. OSSOLA: Well, subject to the ruling under motion
21 to strike -- or rulings under motions to strike. I think it
22 affects three of the summary judgment motions.

23 THE COURT: In this case?

24 MR. OSSOLA: In --

25 THE COURT: MacDermid versus DuPont.

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1 MR. OSSOLA: In their case. Right. One is a summary
2 judgment motion of infringement of the '859 patent, right? So
3 one of them is our motion on our patent, and I believe the
4 other two are MacDermid's motions.

5 THE COURT: Okay. I don't mean to ask you for
6 something that's not in the forefront. What I'm basically
7 getting at is that as MacDermid responds to the motion that
8 you have pending today they say, Well, DuPont has abandoned
9 its claim that the '835 patent is invalid as obvious --

10 MR. OSSOLA: We have not.

11 THE COURT: -- over an earlier DuPont patent.

12 MR. OSSOLA: We have not abandoned any arguments, so
13 that's incorrect.

14 THE COURT: Okay. So this is just a limited argument
15 devoted to the ground that you're putting before us today --

16 MR. OSSOLA: That's right.

17 THE COURT: -- to challenge the '835 patent.

18 MR. OSSOLA: That's right.

19 THE COURT: Okay.

20 MR. OSSOLA: And there may be -- if this matter goes
21 to trial there will be an issue about obviousness of the '835
22 patent. It is not the subject of the summary judgment motion.

23 THE COURT: Before me now.

24 MR. OSSOLA: That's correct.

25 THE COURT: And are you planning to bring the summary

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1 judgment on obviousness under the '835 patent, did you
2 already?

3 MR. OSSOLA: We have not already. I think whether we
4 do in --

5 THE COURT: It obviously depends.

6 MR. OSSOLA: It depends. I mean, we are trying --
7 I'm sure Mr. Horvack is trying, too, to triage this so you're
8 not too burdened, so we have filed certain motions --

9 THE COURT: Okay. Fine.

10 MR. OSSOLA: -- but it certainly is true that we are
11 unable to proceed in those other motions until Magistrate
12 Judge Bongiovanni rules on the motions to strike, so we are
13 waiting for that ruling, and then I think, certainly, our
14 intention is to refile those motions.

15 THE COURT: And whether or not one of those motions
16 was to invalidate the '835 patent based upon basic
17 obviousness, you haven't given up that issue.

18 MR. OSSOLA: One of those motions is not that. So we
19 haven't moved on obviousness on '835. We, certainly, have
20 preserved the issue for trial, so the representation by
21 MacDermid that we have abandoned it is not true.

22 THE COURT: Okay.

23 MR. OSSOLA: And whether we might file a subsequent
24 motion on obviousness does, in fact, depend -- obviously, if
25 this motion is successful then we would not do so, and we

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1 still may not do so depending, frankly, Your Honor, on how the
2 whole picture looks.

3 THE COURT: Understood. Understood. Sure. There's
4 no law that says you have to file a summary judgment on every
5 issue that's contemplated for trial.

6 MR. OSSOLA: We're trying to avoid that.

7 THE COURT: Okay. With that then I'll focus on this
8 motion.

9 MR. OSSOLA: Thank you. This motion is limited, as
10 the Court has acknowledged. We are focusing really solely on
11 a prior art plate, the 45 DPS plate that we believe is grounds
12 both on on sale bar and -- both because it was sold, it was
13 manufactured and distributed, so we have an on sale bar issue,
14 and we have the fact that it was in use, prior public use.

15 THE COURT: Public use.

16 MR. OSSOLA: So we have got both prongs of 102(b)
17 involved in this issue, and with the Court's indulgence, Mr.
18 Allen is going to address certain claims that involve
19 absorption limitations that are only a few of the claims, and
20 then Claim 27 that has a slightly different analysis.

21 THE COURT: I have made a good effort to get through
22 all this paper, and I got through it all. Comprehension is a
23 good challenge. Go ahead.

24 MR. OSSOLA: We will try to assist the Court, and,
25 obviously, be ready to answer questions and try to clarify the

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1 issues.

2 The issue really, first, just to give an overview of
3 our position, this is not a motion, Your Honor, that I'm sure
4 you have encountered where you need to look at a variety of
5 public art or prior art and put it together and look at it.
6 That is not this motion. This motion is predicated on facts
7 pertaining to DuPont's 45 DPS plates. And I would represent
8 to Your Honor that those facts that are affirmatively
9 presented by DuPont are not controverted on this record.
10 There is a dispute about corroboration, which I think is the
11 centerpiece of their defense, but as to the facts that I will
12 walk you through, the key facts, there is nothing in the
13 record to contradict those facts. There are, in our view,
14 misrepresentations of that record, but there is nothing
15 affirmatively in the record to dispute what I'm about to walk
16 you through.

17 So, we believe the clear and convincing standard that
18 is applicable here of invalidity is demonstrated by this
19 record, and we don't -- we believe there is no genuine issue
20 of material fact that stands in the way of summary judgment.
21 And that is particularly important, obviously, on any
22 motion -- summary judgment motion, dispositive motion, but
23 here in particular where there are various things that have
24 been denied by MacDermid or that have been alleged by
25 MacDermid that we believe do not raise a genuine issue of

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1 material fact, that raise neither tangential issues that are
2 not core to this motion or they raise no genuine issue at all.
3 But I emphasize the genuine issue of material facts because
4 that will be important.

5 THE COURT: When I'm nodding my head, I'm indicating
6 I'm hearing you and understanding you and nothing more.

7 MR. OSSOLA: We understand that, Your Honor.

8 THE COURT: Okay.

9 MR. OSSOLA: So to reorient you -- and I know we have
10 been through Markman on this patent and the prior summary
11 judgment motion on this patent, but you have had who knows how
12 many cases in between, but we are talking about a reissued
13 patent, the only patent that is asserted against DuPont by
14 MacDermid. We are talking about a critical date that is
15 important, which is one year before filing, which is
16 October 11th, 1998, for purposes of the discussion of 45 DPS,
17 which, by the way, I should tell you what it is: It is a
18 digital plate that was developed by DuPont and that had a
19 base, a photopolymer, a LAMS layer -- I'm going to walk you
20 through that -- and that base, as we will discuss with you,
21 the Cronar® Blue Base, as it is called, had the elements that
22 are presented in these claims.

23 THE COURT: I understand that's your point. There
24 was a DPS, and there were a few other plates in various times
25 that had a different last initial like DPU. Does the "S"

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1 stand for anything, do you know?

2 MR. OSSOLA: Yes. I'm going to have to ask Mr. Allen
3 what that particular acronym is.

4 THE COURT: You don't have to. I mean, that's okay.

5 MR. OSSOLA: I mean, first of all, it was -- that's
6 what they designated it as. I'm trying to recall why DuPont
7 did that. It is not the DPU plate.

8 THE COURT: Right. Right. And it is a 45 mil?

9 MR. OSSOLA: Yes. That's the gauge. That's the
10 thickness of the plate.

11 THE COURT: Right. Okay. Go ahead.

12 MR. OSSOLA: So that is the only plate we're talking
13 about here today.

14 THE COURT: Okay.

15 MR. OSSOLA: The asserted claims, there are 12 of
16 them. Some are method claims. Some are product claims. We
17 have outlined them here. And, you know, I guess the general
18 description here of what we're talking about in the patent are
19 digital flexographic printing plates having a UV-absorbing
20 support layer, and the Court may recall that phraseology and
21 that issue from the Markman hearing, and we'll get to that.

22 So what is our position? Our position is that all of
23 these asserted claims, all 12 of them, of the '835 patent are
24 invalid under the on sale or public use bars of 102(b), and
25 the principal basis for that is that prior to the critical

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1 date, October 11th, 1998, DuPont sold 45 DPS plates to
2 domestic customers. And we believe that the record that we
3 will walk you through, the key parts of that are presented
4 with our motion, establish that in a clear and convincing way
5 and that there is no evidence to contradict it.

6 Secondly, our argument is that DuPont publicly used
7 its 45 DPS plate to make printing plate samples for domestic
8 customers, and that that public use invalidates the method
9 claims 13 through 18.

10 One of the things that may help the Court to put this
11 in context is what was going on with this DPS plate. This was
12 a digital plate way back in the 90's when DuPont, which was
13 the first to introduce a digital plate to the marketplace and
14 has many patents related to it, was seeking to move the
15 marketplace from the analog plates to the digital plates. And
16 that's the context in which 45 DPS was developed, and when we
17 talk about the customer jobs, what was going on was DuPont was
18 manufacturing these plates, was promoting these plates, was
19 making these plates for customers according to their specs in
20 an effort to have customers move their business to digital
21 plates because of the many benefits that the Court is aware
22 of, I think from prior briefing, of digital versus analog.

23 THE COURT: Well, then it was also in connection -- I
24 think the machine is called CPI that cost half a million
25 dollars that processed the blank plates into finished printing

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1 plates.

2 MR. OSSOLA: You're right. So part of the --

3 THE COURT: Right?

4 MR. OSSOLA: Yes. That is correct. And part of the
5 transition to the marketplace is that in order to do this a
6 customer would have to acquire a processor -- an expensive
7 processor -- to digitally process these digital plates. And
8 that was part and parcel of if you were going to make the
9 transition from analog to digital you had to have a processor
10 that could do that. So you're quite right.

11 And it is quite important in the testing, the submitted
12 testimony of Dr. Taylor because that -- he was the person in
13 the middle of that. The reason that he was doing what he was
14 doing, and the reason that it easily satisfies the public use
15 requirement is because they were trying to demonstrate to
16 customers that they should make this transition, and as the
17 Court knows, the investment.

18 All right.

19 THE COURT: If this machine runs these blanks through
20 there you'll get a good printing plate out of it.

21 MR. OSSOLA: Not only that, we'll show you, as Dr.
22 Taylor discussed in his declaration and as the various
23 exhibits attest to, in order to get customers to believe in
24 this what Dr. Taylor was part of an effort in doing is saying,
25 We'll show you. You tell us what your specifications are, and

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1 we will make these digital plates for you, send them to you,
2 and you'll see how good they are, and then you'll order the
3 digital plates and you'll eventually get the digital
4 processor. And, in fact, I think Your Honor knows the
5 marketplace. It turned out to be an enormous success. The
6 marketplace accepted the digital technology, and there are a
7 very large number of digital processors out there in the
8 marketplace today. But these were the early days.

9 THE COURT: Okay. Go ahead.

10 MR. OSSOLA: So DuPont's 45 DPS plate, what was it?
11 It was a digital flexographic printing plate. As I said, it
12 was developed, manufactured, and made commercially
13 available -- that was the whole point of doing this -- by
14 DuPont prior to October 1st, 1998.

15 The structure of the plate, in terms of what is this,
16 is familiar to the Court from Markman. What we have
17 reproduced here is right out of the record.
18 Coversheet/Photopolymer/Support, sort of the parts of the
19 sandwich. The LAMS -- the so-called LAMS layer was DuPont's
20 coversheet. The photopolymer used was PLS, and where we'll
21 devote the most attention is Cronar® 773 Blue Base, which I'll
22 probably just call "Blue Base" during this argument, was the
23 support layer.

24 The method of use, the Court may recall this, you first
25 back expose, then you form the -- and why do you back

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1 exposure? You're forming the base --

2 THE COURT: The floor.

3 MR. OSSOLA: The floor.

4 THE COURT: -- in the middle layer by shining your
5 light through the support layer.

6 MR. OSSOLA: Correct.

7 THE COURT: Some of it getting through to the middle
8 layer.

9 MR. OSSOLA: Some of it getting through with a goal
10 being a uniform floor.

11 So you back exposure, then you have the laser ablation
12 on the top. You have the front exposure. Laser ablation of
13 the LAMS layer, front exposure to create the relief, and then
14 at this point -- this was before the thermal development,
15 which is the subject of our other patent -- it was then
16 developed with a solvent.

17 THE COURT: Okay. Got it.

18 MR. OSSOLA: Okay. So what is the evidence that
19 we're asking that we presented to the Court that we contend
20 satisfies our burden of proof? Well, let's focus for a moment
21 on the Blue Base. It was a support layer with a uniform --

22 THE COURT: It seems like almost all of your disputes
23 on this motion concern the support layer really.

24 MR. OSSOLA: I believe that's true.

25 THE COURT: Okay.

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1 MR. OSSOLA: And I think primarily -- at least the
2 way I see the briefing, stepping back and looking at it as to
3 whether it's been sufficiently -- our evidence has been
4 sufficiently corroborated, and I'll get to that legal point.

5 THE COURT: Right. We're talking about the base.

6 MR. OSSOLA: We are.

7 THE COURT: We're really not concerning ourselves
8 particularly with the ablatable layer or the polymer or the
9 middle layer.

10 MR. OSSOLA: Some of the claim -- when you --
11 unfortunately, as you know, it is a claim-by-claim analysis.
12 Fortunately or unfortunately. Some of the claims do deal with
13 that other structure.

14 THE COURT: But I don't think there's any much fuss
15 about it.

16 MR. OSSOLA: I agree. There is not -- I agree with
17 that.

18 THE COURT: Okay. Go ahead.

19 MR. OSSOLA: I don't think there are any genuine
20 issues of material fact with regard to those aspects of the
21 plate or any aspects of the plate.

22 All right. So this support layer developed by
23 DuPont, as the documents we have submitted show -- they go
24 back to the early 90's -- originally tried out on thin analog
25 plates. And, so, this Cronar® material, this Blue Base goes

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1 back -- Exhibit K to the Taylor declaration -- to 1991.

2 THE COURT: Okay. Originally used on thin analog,
3 which would include a 45-mil analog plate. Was there such a
4 thing?

5 MR. OSSOLA: I believe there was.

6 THE COURT: Okay. But 45 or even a 67 would be a
7 thin plate, yes?

8 MR. OSSOLA: Yes.

9 THE COURT: Okay. Go ahead.

10 MR. OSSOLA: Exhibit K -- and I know that we have
11 tried to keep the exhibits to a minimum --

12 THE COURT: I have had no trouble digging through the
13 exhibits.

14 MR. OSSOLA: -- is a research report.

15 THE COURT: I don't know necessarily what they say,
16 but I see them.

17 MR. OSSOLA: It just -- hopefully it helped the
18 Court. What Exhibit K really is when you look at it and when
19 you look back at it is it is a research report by DuPont for
20 its development of this Blue Base. So it goes way back to
21 before the critical date when they developed this plate. The
22 material specification for the Blue Base is important -- and
23 we'll tie this in later, and Mr. Allen will tie this back so
24 you can see why this is particularly important -- but the
25 record is clear, and, again, uncontroverted on this; there was

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1 a range of UV absorption that was identified early on by
2 DuPont as between, and I apologize, it is a logarithmic ratio
3 of 1.930 to 2.340. That is what the standard was, and that is
4 in the raw material specifications that's submitted in the
5 record.

6 And then there is the 30(b)(6) testimony of Dr. John
7 Shock, a longtime DuPont scientist who worked on and with Blue
8 Base -- Cronar® 773x Blue Base, and who testified at length
9 about it but, in particular, that the formulation and the
10 specifications never changed.

11 So let's step back for a moment. I know the Court is
12 familiar with this, but we do have two different legal
13 standards that are applicable to the method and product
14 claims; the on sale bar, in which the question is whether the
15 product was sold in the United States prior to the patent's
16 critical date and whether the product embodies every
17 limitation. Again, we're just talking about one product here.
18 And then the public use bar. Was the method -- were the
19 methods claimed in the patent -- here the '835 patent --
20 publicly used in the United States prior to the patent's
21 critical date, and our argument is that DuPont commercially
22 exploited that method, practiced that method without act of
23 concealment.

24 In fact, as I just explained, that would have been
25 wholly contradictory to what DuPont was trying to accomplish,

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1 which was to introduce this technology to customers and to the
2 marketplace. So it was actively promoted in brochures, in
3 customer jobs, and in marketing efforts, and in disclosures to
4 the public. And those methods embodied -- those methods that
5 were used by DuPont embodied every claim limitation.

6 So let's briefly talk about the corroboration
7 requirement, which arises in different contexts. Sometimes it
8 arises as an issue related to an inventor's testimony. That's
9 not this case. This case, the corroboration issue has been
10 raised with respect to the testimony of the DuPont scientist,
11 but with due respect, we would say that it has also been
12 somewhat misrepresented. It is -- consists of, of course,
13 testimony and excerpts of that testimony and, again, quite
14 extensive documentary evidence that is contemporaneous. I'll
15 come back to that in a moment.

16 But what is the legal standard? There's certainly no
17 dispute about that. All pertinent evidence is examined.
18 There is no magic piece of evidence that must be there.
19 There's a suggestion by MacDermid that certain things are
20 missing that must be presented in order to satisfy the
21 corroboration requirement. That is not the law. It is true
22 that documentary or physical evidence that is made
23 contemporaneously provides the most reliable proof, and we
24 have provided that. And that citation is from a Federal
25 Circuit case, the Sandt Tech. case.

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1 So let's move to the evidence on the sale, Your
2 Honor, if we may, and there were multiple sales. We did not
3 want to -- we wanted to keep the record to a minimum here, so
4 we picked out three. And as identified here on November 1997
5 to Banta Digital Group. Another sale to that same group on
6 December 30th, 1997. And then another sale before the
7 critical date, May 28th, 1998, to Cage Graphic Arts. Those
8 sales and the invoices are -- I believe there's nothing in the
9 record to controvert that these sales were made and that they
10 were sales of the 45 DPS plate.

11 THE COURT: And without looking at the invoice can
12 you confirm that the customers actually paid something for
13 these products?

14 MR. OSSOLA: Yes.

15 THE COURT: Were they promo pieces that were supplied
16 without charge?

17 MR. OSSOLA: These were paid for, and the invoices --
18 and I'll move to the next one -- reflect that. And this is
19 just one. This is Exhibit N, a December 31, 1997 invoice.
20 And, as you can see -- and I'll address here, you know, one of
21 the points of clarity that we need to make here --

22 THE COURT: So this would be an invoice to the
23 customer Banta?

24 MR. OSSOLA: That's right. And it shows the purchase
25 price on the right-hand side. And what is this? Well, it's

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1 described by Dr. Taylor as providing the gauge and polymer
2 family 45 DPS that provides the EXP DD, which MacDermid
3 attempted to make into the genuine issue of material fact,
4 which means the record says only that those plates were
5 manufactured in Europe, and they're exported to the U.S. The
6 facility, the DuPont facility manufacturing 45 DPS was in
7 Germany. DuPont Deutschland is what "DD" means. That was
8 explained by Dr. Taylor.

9 So, there isn't -- and, as you can see from this just
10 excerpt on the top line of the invoice 45 DPS EXP DD. There
11 wasn't enough room spacewise -- and this was explained by Dr.
12 Taylor -- to have EXP DD replicated in the next line down, but
13 that's what it was. It was a 45 DPS plate made for export.
14 That's it. There isn't a genuine issue of fact as to whether
15 this is, indeed, the plate that was sold at that time. This
16 is what it was called for the reasons I just outlined.

17 THE COURT: I follow insofar as you're pointing to
18 the first line on that excerpt, but the second line looks like
19 another plate. What is the second line that begins with the
20 number 106.68?

21 MR. OSSOLA: The second line is giving --

22 THE COURT: The centimeter measurement of the same
23 item?

24 MR. OSSOLA: Exactly.

25 THE COURT: Okay. So 42 by 60 is inches.

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1 MR. OSSOLA: Yes.

2 THE COURT: And 106.68 by 152.4 is centimeters.

3 MR. OSSOLA: Yes.

4 THE COURT: Okay. Fine.

5 MR. OSSOLA: All right. So these 45 DPS plates were
6 used to make printing plate samples for U.S. customers, and I
7 referred to it earlier DuPont -- and it is in the documents --
8 referred to them as customer jobs. They were done at the
9 behest of customers to assist customers in making a
10 transition. May 5th, 1998, Cage Graphics there were -- one of
11 the 15 customer jobs that was done in this time frame was done
12 for them using 45 DPS plates. This was performed by Dr.
13 Taylor.

14 THE COURT: That would have been the shipment to Cage
15 on May 26, 1998?

16 MR. OSSOLA: That's correct. And Dr. Taylor laid
17 this out clearly and unequivocally, and it is not disputed.
18 In his personal knowledge he was responsible, he was involved,
19 he actually performed this with a team. These jobs were done
20 by him and his team in Wilmington, Delaware at DuPont's
21 manufacturing facilities. The details of processing the
22 plates for customers were logged, and we have presented that
23 to the Court, further verifying that these plates were made
24 and were processed by DuPont, that the method that was used
25 and they produced plates for customers.

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1 And by the way, Exhibit G, which contains those
2 processing details for the customer jobs, identifies the
3 plates by batch numbers, identifies the customers. I mean, it
4 is quite specific, and it is, obviously, contemporaneous.

5 There is no question on this record that DuPont was
6 not concealing this processing of these digital plates; was,
7 in fact, promoting in telling customers about it.

8 THE COURT: So you have moved from on sale to public
9 use?

10 MR. OSSOLA: Yes. I'm sorry, I should have said
11 that, but you're correct.

12 THE COURT: Okay. Go ahead.

13 MR. OSSOLA: So they were performed, as I said, at
14 the customer's request. And the record shows that customers
15 had certain requirements, as you could imagine, of what they
16 wanted for plates; the relief depth, which was, in part,
17 depending on how the back exposure was performed, but this was
18 not an abstraction. This was done for customers based on
19 their specifications.

20 THE COURT: "BX" is an abbreviation for back
21 exposure?

22 MR. OSSOLA: Yes, Your Honor.

23 THE COURT: On your handout.

24 MR. OSSOLA: Yes. There was also in the record
25 contemporaneous brochure and operating manuals that described

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1 all of the processing steps that DuPont went through with 45
2 DPS in publicly using the method described in this patent.

3 THE COURT: Well --

4 MR. OSSOLA: I'm sorry.

5 THE COURT: Go ahead.

6 MR. OSSOLA: And for the purpose of educating
7 customers about how they could do the same.

8 THE COURT: Right. But when it tells you what to do
9 it says, Use our good plate, our DPS plate, and here's what
10 you do with the plate as you operate this machine.

11 MR. OSSOLA: Correct.

12 THE COURT: Okay. How much does it say about what
13 the plate consists of?

14 MR. OSSOLA: Well, that is -- these particular
15 brochures, for example, Exhibits E and F, are the Digital
16 Imager Operating Guide that describe the actual steps, so
17 these particular exhibits do not explain the structure, but
18 the structure is in the record, and we'll get to that. The
19 structure is also identified. The structure and the
20 formulation.

21 THE COURT: Well, this -- I think it brings us to
22 something that MacDermid is probably going to argue, so I'll
23 just let you address it now and then further later. Handing
24 somebody the plate, is that enough to establish public use?

25 MR. OSSOLA: No.

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1 THE COURT: Even if the person doesn't know what the
2 sandwich consists of and can't readily disassemble the
3 sandwich and find out what it is and how it works?

4 MR. OSSOLA: The answer is no. And, of course,
5 that's not what we're arguing. We're arguing that we publicly
6 used it.

7 THE COURT: Used the plate, right.

8 MR. OSSOLA: And we processed it. But to answer --
9 further answer your question, if the customer with the manual
10 had the processor, had the plates then processed plates, that
11 would be other evidence prior to the critical date, that would
12 be other evidence of invalidity, but that is not this record,
13 and that is not our argument.

14 THE COURT: No, I don't think that was my question.

15 MR. OSSOLA: I'm sorry.

16 THE COURT: I'm focusing on the plate. I know that
17 the plate was available for sale and at the time of the
18 critical date the machine was available for sale.

19 MR. OSSOLA: Yes.

20 THE COURT: And instructions to the user, the
21 customer, as to how to make their own printing plates with
22 this machine using these blank plates, those instructions were
23 available. It has to do with that case, forgive me, it is the
24 case where there was a tape -- it was some kind of tape, and
25 the question was whether you're publicly using it if the

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1 customer can't tell what the tape is made of, but the tape is
2 out there.

3 MR. OSSOLA: Right.

4 THE COURT: So here the customer can, you know, get
5 the physical plate, but it can't find out or does it matter
6 whether the customer can find out what the plate is made of in
7 the field without getting hold of DuPont's specifications lab
8 specs? Factory specs.

9 MR. OSSOLA: It does not matter for purposes of this
10 motion.

11 THE COURT: That's what I'm asking legally.

12 MR. OSSOLA: It does not matter legally for purposes
13 of this motion. In fact, customers had that information, but
14 that is not what we're -- but for purposes of this motion
15 we're not arguing that the customers were doing what you
16 described, taking a blank plate. What we're saying is DuPont
17 was actually manufacturing, publicly disclosing the structure
18 and processing steps to customers as DuPont in these customer
19 jobs processed those customer plates.

20 THE COURT: All right.

21 MR. OSSOLA: Does that address Your Honor's question?
22 I want to make sure I do.

23 THE COURT: No, because I'm asking does it matter
24 whether the customer -- way back at the beginning of this
25 case, and my memory of that is extremely hazy, and I'm not

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1 asking you to remember, but I remember people saying, well, if
2 you won't, you know -- if you won't give us your plate and
3 some information about how the plate is composed, we can't
4 just reverse engineer it by looking at the plates. We can
5 slice it and dice it, but we still cannot tell what this plate
6 is made of so as to know what it is made of, unless we can get
7 your manufacturing specs. We know we have a plate out there
8 in the field. That's my question. Is it public use if you
9 put this plate out there, you know, on display for the public
10 but do not tell them what the plate is made of? Never mind
11 how it's used in a machine.

12 MR. OSSOLA: No. I believe the answer is no, Your
13 Honor.

14 THE COURT: It is not public use.

15 MR. OSSOLA: That would not be public use.

16 THE COURT: What do you have to tell them about
17 what's in the plate in order for it to be public use?

18 MR. OSSOLA: Well, the structure, formulation, which
19 was given to customers with regard to 45 DPS, and how to
20 process the plates, all that information was given to
21 customers.

22 THE COURT: All right. Let's move on then.

23 MR. OSSOLA: Let me just mention the Gore case. It
24 was a source of dispute. In our view it shouldn't be. It
25 involved the secret use of a patented process. There's no

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1 confidentiality agreements. They didn't not have customers
2 signing anything. They wanted customers to have as much
3 information as possible. This is as far from law as you can
4 get factually.

5 All right. Perhaps -- I hope this helps the Court a
6 little bit. The argument here about public use was that these
7 jobs involved commercial exploitation of the patented feature
8 by DuPont.

9 THE COURT: Yes.

10 MR. OSSOLA: And they were incorporated into the
11 sales process, and they were critical to the success, as I
12 have made clear. And we cite an old Supreme Court case, but
13 there are other authorities cited that practicing a process in
14 a factory in the usual course of producing articles for
15 commercial purposes is a public use, regardless of what the
16 customer knows; that's a public use.

17 All right. This --

18 THE COURT: Now, are these two tests product claims,
19 method claims, product claims on sale, method claims in public
20 use, is that how they line up?

21 MR. OSSOLA: Generally, yes.

22 THE COURT: Okay.

23 MR. OSSOLA: So the product claims here, 30 and 31,
24 claim a digital flexographic printing plate having a
25 UV-absorbing support layer. The method claims talk about

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1 making a printing plate from a digital flexographic printing
2 plate having a UV-absorbable support layer, and then the
3 method claims 16 through 18 and 24 through 27 have to do with
4 those UV-absorbing support layers have certain specified
5 percentages of the UV radiation that's used in the back
6 exposure.

7 All right. If we can break this down a little bit
8 first, and I think you're correct, there isn't a dispute about
9 at least some of these claims. Claims 30 and 31, digital
10 flexographic printing plate comprising an ablation layer, the
11 LAMS layer, a layer of solid photocurable material, and a
12 support layer in which there's an actinic radiation-absorbing
13 compound that is uniformly distributed throughout.

14 THE COURT: And it is made of this PET.

15 MR. OSSOLA: And one of the claims says it must be
16 made of this PET, which DuPont's was. And that isn't in
17 dispute, so I really don't think there's much of an issue
18 there.

19 This up on the screen, Slide 16 simply shows that --

20 THE COURT: Just a second. This radiation-absorbing
21 compound uniformly distributed throughout in the Blue Base.

22 MR. OSSOLA: Right, Tinuvin® 900.

23 THE COURT: I'm just not sure that that's conceded by
24 your adversary, that that was its setup.

25 MR. OSSOLA: I think I already acknowledged that.

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1 And I think that goes to the support layer. You're correct.
2 I overstated it. I think the first two elements, going back
3 to the Court's comment at the beginning, are really not at
4 issue. The support layer is at issue.

5 THE COURT: Okay.

6 MR. OSSOLA: But we submit, while they tried to make
7 it an issue, it isn't.

8 THE COURT: You say you got it, right?

9 MR. OSSOLA: We've got it. Going back to what you
10 saw before, we're talking about the LAMS layer, the polymer
11 used was called PLS. Polymer and the Cronar® Blue Base.
12 That's what meets the elements of product claims 30 and 31.

13 But let's keep going. The LAMS layer -- I won't linger
14 on this -- but it embodied the ablation layer limitations. I
15 don't think this is even at all in dispute that the LAMS layer
16 was a UV-absorbing black layer sensitive to IR radiation. The
17 Court has dealt with that before. I don't think that's an
18 issue.

19 Similarly, the PLS photopolymer used by DuPont, it is
20 indisputably true and on the record. I don't think it is
21 disputed that that also meets part of the elements of the
22 claims before we get to the support layer.

23 So let's get to that support layer, the Blue Base,
24 that the record establishes contains all of the elements of
25 the claims. What did the formulation of that Blue Base

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1 comprise of? Well, PET, the -- I mentioned Tinuvin® 900,
2 that's the absorbing compound, the actinic radiation-absorbing
3 compound. That's identified in the record in Taylor
4 declaration Exhibit K. And there isn't any question based on
5 the record, again, there's nothing affirmative offered by
6 MacDermid on any of this that from the beginning the Blue Base
7 had this uniform absorbing -- UV-absorbing compound Tinuvin®
8 900 in it. Dr. Shock was clear on that. He was involved in
9 the development and use of it from the early 90's, and the
10 record plainly establishes that.

11 THE COURT: Is that what makes the base blue?

12 MR. OSSOLA: No. There's a blue dye added to it. I
13 think it is a dye. Is that right?

14 MR. ALLEN: Yes.

15 MR. OSSOLA: Yes. It is not the Tinuvin®, as I
16 understand it, there's also for whatever reason, and I can't
17 tell Your Honor the reason, there's also a blue dye that makes
18 it -- I think it is probably for marketing purposes gives it a
19 tinge.

20 THE COURT: Okay. Give me a second, please.

21 Henderson is your expert?

22 MR. OSSOLA: Yes, Your Honor.

23 THE COURT: And his declaration for this motion, as
24 distinguished from his expert report, his declaration to this
25 motion, which is exhibit -- with is exhibit -- it is a filing.

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1 It has got a year that's --

2 MR. OSSOLA: Yes, Your Honor.

3 THE COURT: O through W. Take your time.

4 MR. OSSOLA: Yes. Give me a moment just to find it.

5 THE COURT: Oh, sure. It is just on top of Exhibit

6 O. It comes after Exhibit M, but has a different --

7 MR. OSSOLA: I'm there with you. Sorry.

8 THE COURT: Okay. So you see the cover page is

9 "Declaration of Henderson."

10 MR. OSSOLA: Yes, Your Honor.

11 THE COURT: And before we get to Exhibit O, Henderson

12 has given us nine pages to look at.

13 MR. OSSOLA: That's right.

14 THE COURT: With his signature on the last page.

15 MR. OSSOLA: That's correct.

16 THE COURT: And it is like a little mini report.

17 MR. OSSOLA: That was intended to be that, yes. Not

18 submit the whole expert report to Your Honor, but, rather,

19 focus on the issues that mattered to this motion.

20 THE COURT: On page 3 of that --

21 MR. OSSOLA: Yes.

22 THE COURT: You may not have the answer to this, but

23 I was really struck by the last -- the next to last line read

24 in context, and it explains why I would be asking you whether

25 the blue was the Tinuvin®.

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1 MR. OSSOLA: Then I may be wrong because he talks
2 about Tinuvin® series of dyes; it could be that the Tinuvin®
3 had the blue color in it.

4 THE COURT: Could be.

5 MR. OSSOLA: And I wish I could be -- that was not my
6 understanding, and, perhaps, Mr. Allen can clarify this when
7 he gets up, but I agree with you. The language "Tinuvin®
8 series of dyes," and I don't, frankly, think it affects this
9 motion, but in terms of the point you're raising, it does
10 imply that there was a dye in Tinuvin® 900.

11 THE COURT: When we get to see, also, in his same
12 declaration down at Exhibit R --

13 MR. OSSOLA: R, I believe, is his reference to Dr.
14 Kanga, MacDermid's expert.

15 THE COURT: The opposing expert report.

16 MR. OSSOLA: Right.

17 THE COURT: And he is purportedly studying the
18 support layers he has been given --

19 MR. OSSOLA: Right.

20 THE COURT: -- from DuPont.

21 MR. OSSOLA: Right. For purposes of analyzing
22 infringement.

23 THE COURT: And now where he got a raw support layer,
24 I don't know, but he says I had a raw support layer, and I was
25 also given a support layer integrated with the photopolymer

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1 layer, so with that one I managed to scrape off or dissolve
2 off or peel off the photopolymer layer so as to get an
3 isolated -- he calls it a support layer from a plate, rather
4 than just a raw support layer.

5 At any rate, both of these support layers that this
6 fellow Kanga -- MacDermid's person -- tested, he starts out by
7 saying they were all clear, C-L-E-A-R, clear, and he doesn't
8 say they were blue, so I'm blue.

9 MR. OSSOLA: I do not have -- and, perhaps, Mr.
10 Horvack will have an explanation for that. It is consistent
11 with my understanding that there was a dye added, but how it
12 could have been -- one would have thought that the dye
13 remained in the support layer in the Cronar® material. I just
14 don't know.

15 THE COURT: You can see where I'm a little lost.

16 MR. OSSOLA: I can see that. I will respectfully
17 suggest to Your Honor that the color, the UV-absorbing
18 functionality was the Tinuvin®.

19 THE COURT: I can buy that.

20 MR. OSSOLA: Okay.

21 THE COURT: Okay. That's fine. So we did your Slide
22 18.

23 MR. OSSOLA: Okay. All right. Your Honor, so
24 further getting to the heart of the matter, the uniform
25 distribution. The "uniformly distributed" terminology, which

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1 the Court -- Your Honor interpreted the compound is dissolved
2 in, evenly dispersed in or copolymerized within said support
3 layer. That's what it means. Because that's what you said it
4 means, so, therefore, that is what it means.

5 THE COURT: At the moment.

6 MR. OSSOLA: Understood. On the record there is no
7 genuine issue of material fact that the Tinuvin® 900 was
8 uniformly distributed throughout the base. And we have given
9 you simply some of the quotations from Exhibit K that talk
10 about that uniform -- not only that it was mixed uniformly,
11 but, also, that it was dissolved and uniform distribution was
12 achieved.

13 Now, what MacDermid has pointed you to was one sentence
14 in that document -- I believe it was that document -- where
15 there was a reference to uneven or something of that sort
16 distribution. That was -- but if you look at it in the
17 context of the entirety of the document that was the first
18 run. They recognize they had to fix it, and they did fix it.
19 I think by April 1991 they had achieved this, and it was
20 maintained. And that's what the record shows. So they have
21 selected one item out of the context of the document, again,
22 trying to create a genuine issue of material fact in our view
23 and unsuccessfully in our view because it is not a fair
24 reading of the document, and the document establishes this
25 uniform mixing and another definition or alternative

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1 definition that it was dissolved in the melt.

2 Okay. So if we can move now to the method claims
3 just briefly, we've got Claims 13 and 15. It is the same
4 structure as the product claims, and the processing steps are
5 laid out in these claims that are familiar to Your Honor and I
6 don't think are disputed: The laser ablation, back exposure,
7 front exposure, and then development of the plate.

8 Where is the evidence? Again, as an example the Cage
9 Graphics job in May of 1998. The record shows Dr. Taylor's
10 testimony and the contemporaneous documents that are cited.
11 Some examples are here on the screen is that he used for this
12 customer job 45 DPS plates that had the LAMS layer, the PLS
13 polymer, and the Cronar® base. So, in other words, the plate
14 in question had the elements, and the record establishes that
15 it had the elements.

16 THE COURT: I think that what I hear from the other
17 side is that Taylor's invoice or his shipping document from
18 Germany said this batch has -- I'm working from memory now,
19 but correct me if I'm wrong -- this batch has the LAMS one
20 layer, and this batch has the PLS photopolymer, and the
21 documentation from Germany says it is a 45 DPS plate, but it
22 does not say it's got the Blue Base, so Taylor fills that in
23 by saying they all had the Blue Base.

24 MR. OSSOLA: He knew that. He testifies --

25 THE COURT: But then the other side says, you know,

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1 where is your documentary corroboration that this batch had
2 the Blue Base, rather than some other kind of base?

3 MR. OSSOLA: The record -- Dr. Shock, Dr. Taylor, and
4 the exhibits show that it always had the Blue Base. The Blue
5 Base was developed in 1991.

6 THE COURT: Yes, we know there is a Blue Base. How
7 do we know that it stuck on the bottom of the DPS 45 of batch
8 02-689?

9 MR. OSSOLA: I think if you look at the record, Your
10 Honor, while the invoice doesn't say that all the other
11 evidence indicates that the DPS plates had the Cronar® base,
12 there isn't anything to contradict that.

13 THE COURT: So, where is that shown? You've got J
14 and K that give us the development of the Blue Base back in
15 '91 and '92.

16 MR. OSSOLA: Your Honor, Exhibit I is the
17 manufacturing record, and I would point Your Honor to that, if
18 I may.

19 THE COURT: That's the manufacturing spec?

20 MR. OSSOLA: Yes, the manufacturing spec.

21 THE COURT: For the plate.

22 MR. OSSOLA: Correct.

23 THE COURT: And this particular one happens to have a
24 date of March 5, 1998, that spec. At the bottom of the first
25 page of it.

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1 MR. OSSOLA: Yes, it does, although the final
2 authorization signature was November 1, 1998, but you're
3 right. The document has stamped "March 5th, 1998."

4 THE COURT: Okay.

5 MR. OSSOLA: So this is the -- and the testimony of
6 Dr. Taylor was this was the final manufacturing recommendation
7 that was implemented.

8 THE COURT: He calls it the recipe.

9 MR. OSSOLA: The recipe. You're right.

10 THE COURT: That is what he calls it.

11 MR. OSSOLA: You're correct.

12 THE COURT: This is not a recommendation. This is
13 the "it." This is what you have to do.

14 MR. OSSOLA: That's right.

15 THE COURT: That's what he says, although it is
16 called a "recommendation."

17 MR. OSSOLA: But he says -- and it is not
18 contradicted, and he has personal knowledge, and he was
19 actually participating personally on this, and without
20 bringing this up too many times, there is nothing in the
21 record to contradict this.

22 THE COURT: Okay. Fine. So show me where the Blue
23 Base --

24 MR. OSSOLA: So if you go to page -- if you look at
25 the bottom of the last two digits 531, which is like three or

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1 four pages in --

2 THE COURT: Sure.

3 MR. OSSOLA: -- it sets forth the plate structure.

4 If Your Honor goes to the top of that page --

5 THE COURT: Right.

6 MR. OSSOLA: -- for DPS. It says -- you have seen
7 this before when I showed you -- "coversheet photopolymer
8 support 45 DPS." It says, "LAMS/PLS polymer/Cronar® 773 Blue
9 Base." There it is. These plates were made with a Blue Base,
10 and this document establishes that they were, in addition to
11 what Dr. Taylor said. They all had it. They all had that --
12 that was the Blue Base that was -- that Blue Base was
13 developed by DuPont and was used on all of the DPS plates, and
14 this document confirms it. It confirms it. It was said. I
15 believe it was said by Dr. Shock. It was said by Dr. Taylor,
16 and this manufacturing record makes clear that that is, in
17 fact, what was done well before the critical date, and, in
18 fact, the period of development here for -- in Exhibit I was
19 '94 through '97, and you can see a couple different plates
20 being developed, but DPS is the only one of concern.

21 I do not believe, with due respect to our opponent,
22 that there is anything that MacDermid can point to that
23 creates a genuine issue of material fact as to whether the 45
24 DPS plates that were sold and that were made publicly
25 contained Cronar® Blue Base.

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1 THE COURT: All right. I think that they say,
2 though, it is your duty to show by clear and convincing
3 evidence that you had it.

4 MR. OSSOLA: It is -- and we certainly don't dispute
5 that -- but it also is their burden to come forward with
6 something on summary judgment that would bring that into
7 question based on the testimony and the manufacturing
8 documents. They have come forward with nothing, and when you
9 think about a trial, I mean it was their burden to come
10 forward -- if they had some other evidence, it was their duty
11 and their obligation, and, surely, they would have brought it
12 forward. There isn't anything.

13 THE COURT: At summary judgment the nonmoving party
14 has to come forward with what they've got.

15 MR. OSSOLA: That's right.

16 THE COURT: The summary judgment motion is to elicit
17 the counterveiling evidence such as there is.

18 MR. OSSOLA: And it is striking on this motion there
19 is none on this critical point. I mean, that is our position.

20 THE COURT: Fine. So let's move on.

21 MR. OSSOLA: Thank you.

22 THE COURT: And, of course, once we hear from them
23 you and your colleague will get a chance to reply. So far I'm
24 able to follow your points.

25 MR. OSSOLA: Well, thank you. I have achieved

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1 something today.

2 THE COURT: Always do. I mean, I always have no
3 trouble following your arguments once we all gather together.
4 Both sides.

5 MR. OSSOLA: Well, with that comment by the Court, I
6 will turn the presentation over so we get into the -- some of
7 the method claims that contain the absorption percentages.
8 I'll turn this over to Mr. Allen.

9 THE COURT: Okay. Fine. Thank you, Mr. Ossola.

10 MR. OSSOLA: Thank you, Your Honor.

11 MR. ALLEN: Good afternoon, Your Honor.

12 THE COURT: Good afternoon, sir.

13 MR. ALLEN: So before I start I just want to correct
14 one thing I think my colleague slightly misspoke about Exhibit
15 I, if you wouldn't mind. So, on the date for Exhibit I the
16 signature on the first page that's 11/1/98. It is our
17 position that that's actually written in the European date
18 format where that should be January 11th, 1998, and that can
19 be seen by if you turn to the last page of Exhibit I, which is
20 314599, the Bates number.

21 THE COURT: Yes.

22 MR. ALLEN: The date approved by supervision there is
23 February 8th, 1998. So this document is well before the
24 critical date, at least February 8th, 1998 when it was
25 approved.

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1 THE COURT: Okay. And this fellow who signs it on
2 the front page, what's his name?

3 MR. ALLEN: Sipkema. So you'll see that.

4 THE COURT: Spell it as best you can.

5 MR. ALLEN: Sure. It is S-I-P-K-E-M-A. And if
6 you'll look on that very last page you'll notice on the
7 distribution list he is the first one and the last
8 distribution, E. Sipkema. And his location is labeled as
9 "NIB," which stands for Neu-Isenberg, Germany. So he is
10 located in Germany.

11 THE COURT: Where is the distribution list?

12 MR. ALLEN: On the last page I had you go to to see
13 the supervision date, 314599.

14 THE COURT: Sipkema, and that's NIB, Germany?

15 MR. ALLEN: Neu-Isenberg, Germany. That's where the
16 plates were manufactured.

17 THE COURT: So you're saying his signature on the
18 first page is January 11, 1998.

19 MR. ALLEN: Yes, I think that's the most consistent
20 interpretation if you look at the last page, the signature
21 page, and when this was approved by supervision.

22 THE COURT: Okay.

23 MR. ALLEN: So today I'm going to talk to you about
24 two more claim limitations that we have left. The first of
25 these claim limitations -- and these are both related to the

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1 support layer, and they are in seven claims my colleague has
2 not discussed yet -- and that's Claims 16 through 18 and
3 Claims 24 through 27.

4 THE COURT: Wait a minute. Just a second, please.

5 MR. ALLEN: Sure.

6 MR. OSSOLA: I think we're on Slide 23.

7 THE COURT: We finished Slide 22?

8 MR. ALLEN: Yes, Your Honor.

9 So these two additional limitations they both relate
10 to the support layer, again, as you have recognized the
11 dispute. The primary dispute is all about support layer
12 limitations, and one of the limitations is percent absorption
13 requirements, and the other limitation is a thickness of the
14 support layer requirement.

15 So Slide 23 starts off with the percent absorption
16 requirement, and that is found in two areas in that they claim
17 16 through 18, which they depend from independent Claims 13
18 through 16. And 16 requires support layer to absorb
19 80 percent to 99 percent of the actinic radiation that's used
20 during the back exposure step. 17 is very similar, just
21 narrows that range a little bit; 85 percent to 95 percent.
22 And then Claim 18 has another special requirement so that the
23 wavelength of your actinic radiation has to be in the range of
24 300 to 400 nanometers. And then it has to absorb 80 percent
25 to 99 percent of the actinic radiation in that wavelength

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1 region.

2 THE COURT: So, when they're talking about 300 to 400
3 nanometers, they're saying you have to shine your light from a
4 certain distance and then measure your absorption rate?

5 MR. ALLEN: No, Your Honor. They're referring to the
6 wavelength.

7 THE COURT: The intensity of the light?

8 MR. ALLEN: Not the intensity of the light. So,
9 light has a specific wavelength, so the UV light has a
10 wavelength in the region of down in the low 200s, and it goes
11 up to like 430 nanometers, so that's the defined region of UV
12 light.

13 THE COURT: So they want you to confine your
14 wavelength that you're using when you beam this light to --
15 that's what you're doing is you're beaming light at the
16 support layer, right?

17 MR. ALLEN: That's exactly correct. So, yes, you're
18 using a bank of what look like fluorescent bulbs, and they're
19 shining up through the support layer, so this is actually
20 saying you confine what you're measuring to the 300 to 400
21 region because these standard lightbulbs, they actually will
22 emit light a little bit higher than 400 nanometers. There's a
23 few peaks, but this claim is saying --

24 THE COURT: Keep your lightbulbs under control.

25 MR. ALLEN: No, it is just saying whatever you -- I'm

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1 sorry to interrupt -- it is saying whenever you go to measure
2 how much is absorbed only look at how much light was emitted,
3 and it is between 300 and 400 nanometers and see how much of
4 the light in that region was absorbed. So it allows for the
5 bulbs to emit light above 400 nanometers, you just don't
6 measure it whenever you're trying to measure percent
7 absorption.

8 THE COURT: Thank you.

9 MR. ALLEN: And, so, then the percent absorption
10 limitation also appears in product claim 24, and that's an
11 independent claim. And from it there are four other -- three
12 other asserted claims 25, 26, and 27. And, so, they,
13 obviously, as dependent claims, also, would require this
14 percent absorption limitation, and, as you can see, it is
15 pretty simple; a support layer has to be capable of absorbing,
16 again, this 80 percent to 99 percent of the actinic radiation
17 used during the back exposure step.

18 THE COURT: The sentence above that you say, "Product
19 claim 24 (and its dependent claims) contain same limitations
20 as product claims 30 and 31, but with one additional
21 limitation described in Claim 24." So the one additional
22 limitation is the 80 to 99 percent range?

23 MR. ALLEN: Yes. Yes, Your Honor.

24 THE COURT: All right.

25 MR. ALLEN: So, yes, Claim 24 still, for example,

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1 requires an ablation layer and a solid photocurable layer, and
2 the dependent claims from Claim 24 have requirements for UV
3 absorbers, and those UV absorbers being distributed uniformly
4 are those examples, which those appear in Claims 30 and 31.

5 So to determine how much of our Cronar® Blue Base,
6 how much actinic radiation that was actually able to absorb,
7 as you'll recognize in the documentary evidence that we did
8 give you, those documents, unfortunately for us, did not say
9 Blue Base absorbs this much actinic radiation. At best, they
10 had a value called "UV absorbance." That was in the
11 specifications sheet that my colleague talked about from 1.93
12 to 2.34.

13 So, to define how much actinic radiation was actually
14 absorbed, our expert acquired a sample of the Blue Base, and
15 the sample that he acquired came from a 45 DPS plate that was
16 retained in the laboratory of Dr. Taylor, who submitted the
17 declaration, and that plate was manufactured around the same
18 time frame, in the 1998 time frame.

19 So you're getting that plate, so that way we can then
20 see -- the purpose of grabbing that plate was to say, all
21 right, we don't have the plates that are used on the plates
22 that were sold in the invoices, but what we can do -- because
23 we're trying to corroborate all the rest of the documentation
24 that's showing, hey, 45 DPS always had Cronar® Blue Base,
25 let's go find something else and corroborate the documentary

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1 evidence. So that's the purpose of finding this sample and
2 support layer; it was corroborative evidence of the rest of
3 the documents and the way that we can actually physically
4 obtain a sample to measure a percent absorption.

5 So, to make sure that the sample of Blue Base that he
6 acquired was, in fact, a Blue Base, Dr. Henderson, DuPont's
7 expert, tested its UV absorbance, and he found that it was
8 2.25, which was within the specification limits, so --

9 THE COURT: So, in other words, it was manufactured
10 to spec.

11 MR. ALLEN: Correct. That is correct. So when he
12 found that then he is comfortable saying this sample of
13 support layer is representative of the support layers that
14 were used on the invalidating 45 DPS sales and public uses
15 because they were manufactured in spec.

16 THE COURT: So then he can go on and test that sample
17 for its absorption range.

18 MR. ALLEN: Yes. Yes, that's correct, Your Honor.

19 So the next step he did was then take that, and he
20 applied the infringement methodology relied upon by
21 MacDermid's expert. For purposes of this motion we're relying
22 on their admitted way, the test for infringement. So common
23 case law says that which infringes later anticipates as
24 earlier, so relying on their infringement methodology Dr.
25 Henderson determined -- and even the exact same equipment, we

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1 went out and purchased what Dr. Kanga used -- found out it
2 absorbed 94.6 percent of the actinic radiation used during
3 back exposure.

4 THE COURT: That's convenient.

5 MR. ALLEN: So based on that testing, the expert
6 concluded that the Blue Base -- because the sample was in spec
7 that then the Blue Base support layers that were manufactured
8 in spec he was able to draw the conclusion that they must have
9 absorbed 94.6 percent or some reasonable range thereof, and,
10 therefore, that would invalidate the 85 to 95 percent
11 limitations and the 80 percent to 99 percent limitations that
12 we previously discussed.

13 So that's the percent absorption limitation that
14 applied to Claims 16 through 18 and 24 through 26. Claim 27
15 also depends from Claim 24, so technically, the percent
16 absorption limitation also follows there, but, as we have
17 shown, we feel the Blue Base there's clear and convincing
18 evidence that that meets the percent absorption limitation.

19 So now moving to Claim 27, it is a dependent claim from
20 Claim 24, and it had one additional limitation, which was the
21 thickness of the support layer. And that additional
22 limitation is actually unique in this patent because a
23 requirement for the thickness of the support layer does not
24 appear in any of the other asserted claims. And the required
25 thickness of the support layer in Claim 27, as is clear from

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1 the language, was from about 3 to 5 mils. So, unfortunately
2 for our position, 45 DPS, even though it met every other
3 limitation of Claim 27, the 45 DPS used the Blue Base, which
4 was a 7-mil thick support layer. So we're talking about two
5 thousandths of an inch difference between the support layer
6 thickness of the Blue Base was and the claim limitations of
7 Claim 27.

8 So, since the 45 DPS product didn't read literally on
9 Claim 27 our expert had to resort to an obviousness type of
10 analysis and basically asked the question: Would it have been
11 obvious -- would Claim 27 have been obvious to one of ordinary
12 skill in the art in view of -- in this case the only prior art
13 we're considering is the 45 DPS plate.

14 And, so, to answer that question our expert went
15 through the standard obviousness analysis. He considered the
16 scope and content of the prior art, as I just mentioned. The
17 plate used was a 7-mil thick support layer, that was the Blue
18 Base, and the 45 DPS plate, as my colleague previously
19 mentioned was a 45-gauge plate, so either 45 mils or if you
20 want to put it in thousandths of an inch, it was .045 inches
21 thick.

22 And then the difference, obviously, I just mentioned
23 was the only difference between Claim 27 and the 45 DPS plate
24 was the support layer thickness, and then our expert in
25 MacDermid admitted to this in their response to our statement

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1 of facts; our expert opined that the level of ordinary skill
2 related to the specific question was that the thickness of
3 your support layer that you use on a plate is related to the
4 gauge of the plate, so the total thickness of the plate. So
5 thin 45-gauge plates, for example 45 DPS, they typically use
6 7-mil thick support layers. Conversely, thicker plates like
7 the 67-gauge plate, they typically use 5-mil thick support
8 layers.

9 So the reason that's important after considering that
10 analysis DuPont's expert came to the conclusion that it would
11 have been obvious to one of ordinary skill if he or she wanted
12 to use a UV-absorbing support layer on a 67-gauge plate to
13 look at the Cronar® Blue Base and say, hey, that has good
14 UV-absorbing properties; I can make a 5-mil version of that
15 and use it on my 67-gauge plate.

16 And what we found in DuPont's evidentiary record that
17 supported Dr. Henderson's obviousness conclusion is that one
18 of DuPont's scientists that you have already heard about
19 today, Dr. Shock, he actually developed this idea prior to the
20 critical date. Dr. Shock had instituted a program to come up
21 with new support layers, new UV-absorbing support layers, and
22 as part of that program whenever they're looking at trying to
23 get new UV-absorbing support layers for 45-gauge plates Dr.
24 Shock came up with the idea, well, while we're doing this, why
25 don't we go make 5-mil versions of UV-absorbing support layers

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1 so that we can use that on certain of our 67-gauge plates that
2 are having some exposure to latitude problems. And MacDermid
3 has attempted to rebut Dr. Shock's --

4 THE COURT: So the Claim 27 that requires the support
5 layer of 3 to 5 mils you say would be satisfied by a DPS
6 67-gauger or by a 45-gauge plate with its existing 7-mil
7 support -- no.

8 MR. ALLEN: Not exactly, Your Honor.

9 THE COURT: No. Well, the reason is because we
10 shifted to obviousness now from in use. What was in use,
11 according to you, was a 45-mil DPS plate that had a support
12 layer of 7 mils.

13 MR. ALLEN: That's correct.

14 THE COURT: That's what you had before the critical
15 date.

16 MR. ALLEN: That's correct, Your Honor.

17 THE COURT: Okay. So you're saying it would be
18 really pretty logical to shrink that support layer down to 5
19 mils in the 45-mil plate, and it would work fine.

20 MR. ALLEN: Our analysis is slightly different from
21 that, that it would have been obvious because a 45-gauge
22 plate -- if you go back to the level of ordinary skill,
23 45-gauge plates typically use 7-mil thick support layers.

24 THE COURT: Which is what you had.

25 MR. ALLEN: Which is what we had, but they don't use

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1 5-mil thick support layers, so just shrinking the support
2 layer down to 5 mil and using it on a 45-gauge plate is not
3 the obviousness analysis that our expert undertook because a
4 45-gauge plate would require a 7-mil thick layer. So, if you
5 shrunk it down to 5 mils, whether or not it would work, I
6 don't know; that's just not what's done in the industry.

7 THE COURT: So I'm looking right at Henderson's
8 statement here. It is just saying it would be fine to use a
9 67 -- to make a 67-gauge plate with a 5-mil version of the
10 Cronar®, but you already had that going on.

11 MR. ALLEN: Not on the 67-gauge plates. He is saying
12 that if --

13 THE COURT: The concepts are not difficult. It is
14 just I'm having trouble understanding what he is trying to
15 say.

16 MR. ALLEN: Yes, so he is saying what we have in the
17 prior art was the 45 DPS plate that had a 7-mil thick support
18 layer, and that plate's total thickness was 45 mils. And what
19 was known in the prior art was that if you have a 67-gauge
20 plate it uses a 5-mil thick support layer. But as of this
21 time there were no 5-mil thick UV-absorbing support layers
22 that we're aware of. So what Dr. Henderson is saying that --

23 THE COURT: No 5-mil thick support layers attached to
24 45 mil --

25 MR. ALLEN: Are attached to 67-mil plates.

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1 THE COURT: Or even attached to 67?

2 MR. ALLEN: Right.

3 THE COURT: Okay. So it would have been obvious to
4 put a 5-mil Cronar® Blue Base on a 67-gauge plate.

5 MR. ALLEN: Yes, Your Honor. It be would have been
6 obvious to create a 5-mil Cronar® Blue Base and then put it on
7 a 67-gauge plate or something similar to that, which is what
8 Dr. Shock -- the idea he came up with prior to the critical
9 date was while we're making these new UV-absorbing support
10 layers, let's make a 5-mil version and put that on certain of
11 our 67-gauge plates.

12 THE COURT: Okay. I get it. And these claims that
13 we're talking about here, Claim 27 and its independent claim.

14 MR. ALLEN: Claim 24, Your Honor.

15 THE COURT: Right. Wouldn't care if this 5-mil
16 support layer is on a 67-mil plate.

17 MR. ALLEN: Yes, Your Honor. The claims aren't
18 limited -- they have no limitations directed to the thickness
19 of the plate, the total thickness of the plate.

20 THE COURT: Okay. Okay.

21 MR. ALLEN: So just in quick conclusion to wrap up
22 both what I have talked about today and what my colleague, Mr.
23 Ossola, talked about, we feel that summary judgment of
24 invalidity on all of the asserted claims is warranted because
25 DuPont has presented clear and convincing evidence on both

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1 that a sale took place, that a public use took place, and that
2 the 45 DPS plate and its method of use embodied all claim
3 limitations in the asserted claims.

4 And, again, we feel that MacDermid has not come forward
5 with any evidence demonstrating a genuine issue of material
6 fact. At best, they have made conclusory attorney arguments
7 or misrepresented certain quotes or taken them out of context
8 of the documents in the record before you.

9 THE COURT: Okay. Well, I'm going to listen to the
10 other side, but I definitely will be asking how does your
11 obviousness analysis that supports your attack on Claim 27 fit
12 under 102(b), and for that you're going to argue, well, you
13 know, it would be the same thing if you look at it under 103,
14 so to that degree we're expanding this motion just to attack
15 Claim 27 under 103, obviousness.

16 MR. ALLEN: Would you like me to address the point
17 now?

18 THE COURT: You can get started, and I'll let you do
19 more.

20 MR. ALLEN: Certainly. Sorry to interrupt you again.

21 So this is a special case, and we have relied on clear
22 case law, TorPharm and In Re: Smith, that talk about whenever
23 you have a prior art product or a prior art use under the
24 102(b) context that if there is a limitation that is not met
25 by that prior art product -- so for this example a support

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1 layer thickness -- that the 102(b) analysis can be extended to
2 capture that extra limitation, and the analysis you apply --
3 and it is clearly laid out in In Re: Smith -- is that you ask
4 was it obvious that additional claim limitation, was it
5 obvious in view of the alleged prior art product? So, here,
6 was Claim 27 obvious in view of the 45 DPS product?

7 So that question -- the analysis you have to undergo is
8 identical to if you were to read 35 U.S.C. 103, that question
9 there is whether the claimed invention is obvious in view of
10 the prior art. So our position is we went through the
11 obviousness analysis, and I just walked you through how Dr.
12 Henderson, he considered the scope and content; that's the 45
13 DPS plate. That's the only prior art that's at issue in this
14 specific analysis. As Mr. Ossola talked about earlier, we do
15 have other obviousness arguments, but they're not at issue in
16 this summary judgment motion.

17 THE COURT: You're just asking me to look at this one
18 argument about obviousness?

19 MR. ALLEN: Yes, just this one argument about
20 obviousness and the only prior art that's at issue that we
21 alleged renders this claim obvious is 45 DPS; that in
22 combination with the level of ordinary skill in the art that
23 MacDermid has admitted to.

24 THE COURT: Has In Re: Smith had a life after 1983?

25 MR. ALLEN: TorPharm cited it, and that was --

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1 THE COURT: That's 2003.

2 MR. ALLEN: Yes, I believe that's correct.

3 THE COURT: Okay. All right.

4 MR. ALLEN: Just one additional point. TorPharm,
5 just so you're clear, it talked about this 102(b)/103 bar to
6 patentability and basically said whether you consider a case
7 of the 102(b) bar or the law of obviousness that the analysis
8 is the same, and that's the analysis that we applied under In
9 Re: Smith, the obviousness-type analysis.

10 THE COURT: But it is only when you are already
11 fairly well advanced in a 102(b) analysis of an overall group
12 of patent claims and a particular on sale in use product or
13 method, right?

14 MR. ALLEN: Yes, Your Honor. We believe it is
15 limited to that specific circumstance.

16 THE COURT: Cleaning up the last few details.

17 MR. ALLEN: Yes, Your Honor. I think that's a good
18 way to put it.

19 THE COURT: We'll have to see.

20 MR. ALLEN: Do you have any further questions?

21 THE COURT: No.

22 MR. ALLEN: Thank you, Your Honor.

23 THE COURT: Thank you very much.

24 MS. O'REILLY: Your Honor, may we have a copy of
25 MacDermid's presentation?

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1 THE COURT: Yes.

2 MR. HORVACK: Your Honor, I'm all set.

3 THE COURT: We should take a five-minute break.

4 MR. HORVACK: Yes, I go much faster than they do, but
5 a break would be fine.

6 (Break taken from 3:35 to 3:45 p.m.)

7 THE COURT: Back in session.

8 MR. HORVACK: Thank you, Your Honor. As you know, my
9 name is John Horvack. I would like to address a couple of the
10 preliminary issues that you spoke to Mr. Ossola about quickly
11 and then move on to the prepared presentation.

12 First is with respect to the motion to strike that's
13 with the Magistrate, those matters solely relate to the other
14 case, DuPont versus MacDermid. There's no motion to strike
15 issue related at all in this case, and, so, those matters are
16 wholly distinct from this particular case.

17 Second thing is, you raised the issue with him about
18 arguing obviousness or whether there's a motion for summary
19 judgment that they will file with respect to obviousness
20 beyond what's here.

21 THE COURT: You raised it in your brief; they didn't
22 respond.

23 MR. HORVACK: That's right. And the scheduling order
24 for this case required motions for summary judgment to already
25 be filed, and, so, to the extent that the scheduling order is

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1 binding and an order of this Court, as it should be, they have
2 no opportunity now to file any further motions for summary
3 judgment. So this is the last pending motion. If it is
4 denied, we should move as expeditiously to trial as possible,
5 given the Court's schedule. So those are the preliminary
6 notes. I believe that there's four separate legal issues to
7 talk about.

8 The first is whether or not there's written
9 corroboration with respect to their claim about DPS 45. That
10 comes from the Barbed-Wire case from 120 years ago, and it
11 continues until today, and we'll talk about that in some
12 detail. In short, they need to provide written corroboration
13 with respect to each and every precise limitation in the
14 claim, and there's very good reasons for that.

15 The second issue is whether or not, given the overall
16 record under the Rule of Reason a juror, a reasonable juror
17 could not find in their favor. I submit that given the
18 credibility issues at stake in this case, the issue is one
19 squarely for a jury to decide.

20 The third issue is unique to method claims, and I
21 believe with all due respect to my colleague on the other side
22 he misquoted and misrepresented the law with respect to method
23 claims. W.L. Gore in 1982, I believe, made it very clear that
24 in order for a method claim to be in the public domain all
25 aspects need to be known with respect to the process, which

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1 would include here the various dynamics of the plate; how it
2 was made, what's in it, and how it was ultimately processed.
3 Those things, I submit, if you look at this plate, would be
4 unknown to anybody in the world.

5 The fourth, rebuttal to Claim 27 in this alleged
6 102/103 bar. It doesn't exist. It is a patent office
7 convention. It is not a convention that's used in court. We
8 know what the principles of obviousness and 102 bar are in
9 courts, and, so, I think that set of arguments are going to
10 fail legally, as well.

11 So, going back to the beginning, and I will go very
12 fast --

13 THE COURT: Well, I wouldn't force you to, you know
14 that.

15 MR. HORVACK: You know this and, so, I'm going to be
16 expeditious. You know that this patent relates to efficiently
17 creating high quality flexographic printing plates. And it
18 does that by tuning the plate at the manufacturer by design,
19 so that if it goes anywhere in the country it can be created
20 even by lawyers with great efficiency and great precision.

21 THE COURT: Impossible.

22 MR. HORVACK: Well, yes, I could have included
23 judges.

24 THE COURT: Also impossible.

25 MR. HORVACK: Could be. Every layperson who has some

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1 skill at all would be able to create with precision and
2 preciseness and repetition a high quality plate given the
3 teachings and claims of this particular patent. As you have
4 gone through, there's product claims and method claims, and
5 the record is clear there's 13 different DuPont products which
6 infringe all of those.

7 I put "sole defense." Sole defense as it remains here
8 with respect to summary judgment is this unique not often used
9 defense of first inventorship, that they created the claims of
10 the '835 patent, not MacDermid. It's a unique defense because
11 often an inventor, a creator, an innovator -- DuPont claims to
12 be all of those -- if they truly did invent these claims, they
13 would have put it into the patent office, they would put it
14 into the public domain clearly, squarely, with precision
15 contemporaneously, and I submit to you that all of those
16 things are lacking here.

17 Technology. Very, very fast. You know that analog
18 plates and digital plates are sandwiches. They're not
19 terribly different from each other. The plates' basic
20 construction is the same, except for the LAMS layer, which is
21 doped with a carbon block, and the method of use is subtly
22 different as a result.

23 Digital plates ablate with a digital laser,
24 computer-guided laser. The mask actually is in the plate
25 itself; that is not true for analog. In analog there's a

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1 separate photo tube put on top.

2 Step two is back exposure. A floor is created with UV
3 light being shown through the back of the supports. Front
4 exposure, which then creates the relief areas by leaving
5 uncured and cured areas. And then a development means, as you
6 know very well, there are four, including thermal, as well as
7 alternative, optional others that have been known for decades.

8 For our purposes there's a significant difference
9 between digital and analog, even though most things are the
10 same. So because the in situ mask is actually part of the
11 plate element, a vacuum is not required to image the plates.

12 THE COURT: And you don't have to stick it in a
13 vacuum chamber.

14 MR. HORVACK: That's right. And suck down the
15 phototool like you do with analog. And, so, with digital you
16 have imaging done in the presence of oxygen. Oxygen has a
17 chemical and physical effect which slows down the curing
18 process. So both analog -- excuse me, so both the back and
19 the front exposure of a digital plate is slower than with
20 analog if everything else is constant. Just by the simple
21 dynamic of oxygen.

22 So in the art it was determined that speeding up the
23 photo speed of the plate itself was a very good idea because
24 you didn't want unduly long front exposure times, which would
25 be inefficient for customers. When you did that, however, the

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1 back exposure times became undesirably short. And that was
2 recognized for the first time by Dr. Kanga. Dr. Kanga
3 determined that short back exposure times cause unpredictable
4 floor depth.

5 THE COURT: It made a messy floor.

6 MR. HORVACK: And an unpredictable floor. Sometimes
7 it would work and other times it would not because the short
8 exposure times did not give good latitude in back exposure.

9 To fix that, the solution was to employ this especially
10 designed support layer of the '835 patent. They have gone
11 through many of these elements, and I won't repeat them much,
12 but I note that they're very precise, particularly in view of
13 your claim constructions, particularly as it relates to
14 actinic radiation. And in order to invalidate all of these
15 claims they need written corroboration to satisfy each of
16 these precise elements.

17 So their motion. The product claims are invalid
18 because of three sales, three sales only: Banta, Banta, and
19 Cage. Method claims they say are invalid because they
20 internally -- Dr. Taylor and his team -- processed the plates
21 and then sent the finished plates to customers. And then they
22 claim 27 is invalid because of this unique 102/103 bar.

23 Basics. There's a presumption of validity. They
24 have the burden at trial for proving it invalid by clear and
25 convincing proof. And on summary judgment, importantly, if

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1 there's any reasonable doubt, if a reasonable juror can find
2 otherwise; i.e., they didn't meet the clear and convincing
3 hurdle, it must be denied. Those are the basics.

4 Here, however, as I noted, it is unique and different
5 because according to the U.S. Supreme Court from 1892 these
6 types of defenses are inherently suspect. When an alleged
7 infringer says later that they have invented the claimed
8 invention to get out of their infringing activity great
9 skepticism from the courts have been put on those types of
10 defenses. Here involved in the Barbed-Wire case, they have 24
11 witnesses, including a deputy-marshal that said that the
12 alleged infringer had a fence -- that the Morley fence was at
13 the fair, and, actually, another witness, Mr. Potter, produced
14 a specimen that he claimed was from that fence, and he
15 produced it at trial. He, apparently, had it in his bag of
16 tricks at home. They brought it in. The District Court
17 credited it. The Circuit Court affirmed it, and the Supreme
18 Court said, Wait, one minute. What you have is not acceptable
19 from its perspective because of the reasons stated here.
20 Forgetfulness of witnesses, their liability to mistakes, their
21 proneness to recollection things as a party calling them would
22 like them to recollect it, aside from the temptation to actual
23 perjury.

24 So as of 1892 the defendant needs proof that is
25 clear, satisfactory, and beyond any -- a reasonable doubt.

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1 THE COURT: Can't be beyond a reasonable doubt.

2 MR. HORVACK: If there's a doubt --

3 THE COURT: I'm saying beyond a reasonable doubt is
4 not the modern standard. Clear and convincing is the modern
5 standard.

6 MR. HORVACK: I agree.

7 THE COURT: Thank you.

8 MR. HORVACK: If there's a doubt, however, for this
9 particular defense, that doubt, particularly at summary
10 judgment, needs to go in favor of the patent holder. And, so,
11 they concluded, we think the doubts that they entertained
12 about who actually invented this should be resolved in favor
13 of the patentee. I believe the Federal Circuit has said
14 that's right. And, by the way, in modern times because of the
15 ubiquitous paper trail created by virtually all commercial
16 activity, it is particularly applicable in modern times. And,
17 of course, DuPont creates lots of paper.

18 So uncorroborated oral testimony is not acceptable as
19 a matter of law, says the Federal Circuit.

20 The cases that I think are must reading for Your
21 Honor are the Barbed-Wire case, which we went through, as well
22 as Lacks Industries, which says while there's some documents
23 that do in some respects corroborate the oral testimony, those
24 documents were too incomplete or contradictory. In fact, they
25 failed to meet certain precise elements of the asserted

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1 claims, and, therefore, the defense had to fail. Same thing
2 in Juicy Whip.

3 THE COURT: How come you're not moving for summary
4 judgment of your sole --

5 MR. HORVACK: Well, I believe -- well, there's
6 a number of strategic --

7 THE COURT: It is hard to get summary judgment --

8 MR. HORVACK: It is. There's a --

9 THE COURT: -- as a plaintiff.

10 MR. HORVACK: I agree. There's a number of strategic
11 reasons why we did not --

12 THE COURT: I don't need to know. Move on.

13 MR. HORVACK: Second, or in addition, the DuPont
14 cases they cite actually prove this very precise and important
15 requirement. In the three cases that they cite there's
16 actually contemporaneously created documents which fully
17 fulfilled all of the claim requirements. Here I submit there
18 is none of that.

19 So, as it relates to this accepted, well-known, and
20 very important requirement of written corroboration for each
21 precise claim element I have gone through the record and I
22 found 10 reasons where they have failed to meet that important
23 standard on summary judgment.

24 The first is with respect to the invoices themselves.
25 It appears, according to the invoices themselves, what they

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1 have sold is a 45 DPS EX plate. As Mr. Ossola indicated,
2 these sales were very early on in the development of digital.
3 And, apparently, they were EX plates, experimental plates.

4 In their reply they have suggested that this is some
5 sort of cutoff of what is really in the first sentence EXP DD.
6 They do that with lawyer argument only. There's absolutely no
7 evidentiary support for that whatsoever.

8 THE COURT: Taylor was happy with it. Taylor was
9 happy with it.

10 MR. HORVACK: Dr. Taylor, with all due respect, did
11 not speak to this issue of EX. Mr. Ossola in his presentation
12 indicated that he did. I would welcome Your Honor to go to
13 his declaration and see that he did not refer to "EX." What
14 he did explain --

15 THE COURT: I didn't dream it.

16 MR. HORVACK: What he did explain was what "EXP/DD"
17 is.

18 THE COURT: Yes.

19 MR. HORVACK: Right. I'm focused on the next line,
20 which indicates it is 45 DPS EX. Their explanation, by lawyer
21 argument only, is that's a cutoff of EXP DD. There's no
22 evidence that that is a cutoff, except their lawyer argument.

23 THE COURT: Well, didn't Taylor tell us -- and
24 forgive me, but I'm thinking along as you make these
25 arguments -- Taylor told us that the second line under the

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1 first line of the invoice is the same item just expressed in
2 centimeters.

3 MR. HORVACK: He did, but he did not --

4 THE COURT: It is the same item then EXP/DD describes
5 the item in line 2 just as well as it describes the line item
6 1.

7 MR. HORVACK: I think that's one fair, reasonable
8 jury interpretation of this. The other fair, reasonable jury
9 interpretation of this is that this is an experimental plate,
10 and, again, there's no evidence that the 45 DPS EX is a cutoff
11 version of what's above. He did not speak to that issue of
12 EX, number one. Number two, if there's a reasonable
13 interpretation here it needs to go in favor of MacDermid, not
14 DuPont. And I particularly say that, given that there's no
15 evidentiary record from them whatsoever, and the issue was
16 posed by them first in reply only, not in their opening brief.

17 So I believe reason for denial number one you can end
18 the inquiry right now and indicate that they corroborated no
19 sales, except for an EX, a reasonable, fair interpretation of
20 the invoices.

21 THE COURT: Have you got an invoice from -- any kind
22 of a shipping document from Germany to Wilmington for batch
23 069 and the other one?

24 MR. HORVACK: There's no such thing in the record.
25 The other thing that's notable here is that there are stock

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1 numbers that are attached to each sale here. For the first
2 one it appears to be 9872550012.

3 THE COURT: I'm sorry. I have lost you.

4 MR. HORVACK: On Page 23 there's a stock number to
5 the left.

6 THE COURT: Just a second, counsel.

7 MR. HORVACK: Page 23.

8 THE COURT: Of what?

9 MR. HORVACK: Of the PowerPoint. It says "Reason for
10 Denial."

11 THE COURT: Mine does not have page numbers.

12 MR. HORVACK: If you go right here, Judge. Sorry.
13 It is in a unique place. Sorry about that. You're right.

14 THE COURT: Okay.

15 MR. HORVACK: On this particular page there's always
16 a stock number, it appears, attached to these --

17 THE COURT: I see stock number.

18 MR. HORVACK: So the second reason for denying their
19 motion is that according to their own testimony these stock
20 numbers can be tied to inventory records, which are tied to
21 manufacturing records. They can trace back where it was made,
22 which would be tied to formulation records and particular
23 procurement records for the materials that are put into these
24 batches. And as it relates -- and there's testimony to that
25 effect. We put it into the record here on Page 24. Their

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1 expert conceded the same thing on Page 25.

2 And, so, on this important issue with respect to these
3 very precise sales, three of them before the critical date,
4 they have failed entirely to produce any of the documents that
5 are attached specifically to these products. So, again,
6 there's stock numbers, which go to inventory records, which go
7 to manufacturing records, which go to formulation records.
8 They have produced nothing as it relates to these particular
9 plates that were sold on these particular dates to these
10 particular customers. And without that contemporaneous record
11 we don't know what these plates are, these 45 DPS EXP DDs to
12 45 DPS EX, whatever you want to call them. Whatever they are,
13 we don't know, based on DuPont's own records, what they are.
14 And that's curious according to the Supreme Court and the
15 Federal Circuit in Woodland Trust because there is a
16 ubiquitous paper trail created by companies, particularly
17 global companies who tout themselves as one of the greatest
18 industrial companies in the world.

19 THE COURT: You are not suggesting a more stringent
20 standard for DuPont than for other challengers.

21 MR. HORVACK: No, I'm simply noting what the law says
22 with respect to commercial endeavors in our time, and I do
23 note --

24 THE COURT: Do you need a complete paper trail in
25 order to satisfy Woodland? They say "ubiquitous," but that

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1 just means everybody has a paper trail. They don't say what
2 paper trail.

3 MR. HORVACK: No, I agree. It could be a formulation
4 record. It could be a manufacturing record. It could be a
5 combination of both, but it needs to be contemporaneous, and
6 it needs to be tied to the sales. And it needs, as I said
7 earlier, to precisely satisfy the claim elements, all of them.
8 There needs to be an identity between what was sold and
9 written, contemporaneous proof of that and what the claims
10 are. Without that, the patentee wins according to the law.
11 And that makes sense. It is the patentee, obviously, that put
12 this into the public domain. It is the patentee who clearly
13 invented this. It is the patentee who has pushed the
14 innovative envelope. It is the alleged infringer, the one who
15 now 15 years later is saying, Whoa, wait a minute, I don't
16 have any documents that are patents, I don't have any
17 contemporaneous writings about what I did, but, really,
18 believe me, Judge, I invented it first. In those
19 circumstances the law quite clearly and quite rightly in my
20 view says we're not going to allow that to happen. The
21 patentee with the written patent prevails. And at a minimum,
22 Judge, this is a jury question, not one that you could resolve
23 on summary judgment.

24 The third reason for denial is, I believe, what you
25 focused on during DuPont's presentation, which was a clear

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1 focus on the support layer. The innovations here clearly
2 relate to the support layer and its importance to the digital
3 format. And, again, we have confirmation from DuPont itself
4 that it created paper trails with respect to this Cronar®
5 support. And we have quoted that here and here as it relates
6 to the formulation. What is notably lacking is roll numbers
7 for the Cronar® support that were attached to these plates,
8 whether it is 45 DPS or 45 DPS EX, what the chemical
9 properties were, what the optical properties were, how it was
10 formulated. Nothing.

11 THE COURT: We have a spec as to how it is supposed
12 to be formulated.

13 MR. HORVACK: From 1991.

14 THE COURT: It never changed.

15 MR. HORVACK: That's not true. So, first of all --

16 THE COURT: I don't want you to lose your train here,
17 but you're whipping through these slides so fast I can't read
18 them.

19 MR. HORVACK: Oh, sorry. Okay. So with respect to
20 27, while you're reading it I'll just tell you it confirms
21 from their 30(b)(6) deponent that a paper trail was created
22 with respect to the creation of Cronar®, and particularly as
23 relates to what support layer was put on what plates.

24 And, so, again, what's lacking here is some
25 confirmation of what the actual support was on these

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1 particular plates that were sold on these three occasions.
2 So, yes, indeed, there is a spec from 1991. There's a
3 research paper from 1992. None of those say that these --
4 that Cronar® was going to be put on these plates, which were
5 going to be created five or six years later. It says we have
6 Cronar®, and it is being used elsewhere, but there's nothing
7 that ties it to the manufacture and sale of what they say
8 invalidates these claims. And --

9 THE COURT: They say that's all they had, so that's
10 what we used.

11 MR. HORVACK: But here you see on Page 27 that they
12 created other records. So if they created other records in
13 the ordinary course, they should be -- if it were true -- able
14 to corroborate it. They have produced nothing on these
15 important, critical, key points. Without written
16 corroboration for the precise elements, the motion needs to be
17 denied.

18 Fourth is simply that their own 30(b)(6) deponent
19 doesn't know the formulation of Cronar® as it relates to the
20 alleged invalidating sales. Well, if that person who should
21 know does not know, then this Court can't possibly know the
22 formulation, and, therefore, invalidate these claims.

23 So, getting to your points, Judge, instead of producing
24 what one would expect, formulation, manufacturing, quality
25 control records keyed to these particular sales which -- which

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1 is their defense, they go back five or six years to a
2 procurement record, some specs from 1991, and a research
3 report from 1992. But, again, please note that the sales
4 occurred in '97 and '98. These are not -- on the face of it
5 these are not contemporaneous records at all, number one.

6 And, number two, their corporate representative did
7 testify that the way in which Cronar® was made, the
8 manufacturing process, did change over time. He didn't know
9 how or why or in what respects, but he knew it changed. And,
10 so, if we have change --

11 THE COURT: Let's look at that testimony for a
12 second.

13 MR. HORVACK: Sure.

14 THE COURT: MPS Exhibit A. Which one is that?

15 MR. HORVACK: Exhibit A.

16 THE COURT: Yes, but who is that?

17 MR. HORVACK: It is attached to our exhibit, Judge.

18 THE COURT: MPS. Okay. Just a minute. I'm there.
19 I'll tell you when I have found the page.

20 MR. HORVACK: In particular, Judge, if you went to
21 Page 80, Line 13 --

22 THE COURT: Yes, that's where I am now.

23 MR. HORVACK: So he says, "There's a continuously
24 improved process to improve the performance of the layer."
25 And he goes on --

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1 THE COURT: So it's mostly process related.

2 MR. HORVACK: That's right.

3 THE COURT: But the formulation always had Tinuvin®
4 900 and blue dye in them.

5 MR. HORVACK: Right. But he didn't know the exact
6 formulation of that layer. So, okay, it has got Tinuvin® and
7 it has got blue dye. What else does it have and what
8 percentages are each? And, further, we have, again, process
9 changes which could very well change the optical outcome of
10 these particular plates. Again, all of this is assuming that
11 Cronar® was on these DPS plates.

12 THE COURT: And then on Page 82 you ask:

13 "Did the amount of Tinuvin® 900 in the Cronar® ever
14 change prior to the critical date?"

15 And he says, "I can't be certain. We had goals. We
16 had a specification right from the beginning of that product,
17 and I think that remained pretty much throughout for
18 absorbance at 350 nanometers. I think it was something like
19 1.93 to 2.34 absorbance at 350 nanometers. So, it was always
20 their task to keep the product in that range, but I'm not sure
21 whether they had to vary the amount of Tinuvin® to do that."

22 "But as far as you know the specification at 350
23 nanometers never changed from DuPont's perspective?"

24 "Not that I'm aware of."

25 MR. HORVACK: Right. So I agree with your

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1 interpretation of all of that. We have got potential process
2 changes to allegedly improve the process. We have got
3 potential formulation process changes, the actual amount of
4 materials going into this, but it appears consistent that he
5 has a wide spec of 1.93 to 2.34 absorbance at 350 nanometers,
6 and it is important to recognize what that means. That's not
7 percent absorption, and it is at a very precise wavelength, so
8 the actinic radiation that's called out in the claim,
9 remember, your construction was it is the -- it was the
10 wavelength which created a change in the material. That is
11 not at one precise wavelength 350, and then there's a
12 dependent claim, which I think is 18, which calls out a very
13 precise nanometer range 300 to 400. It is not at the precise
14 350.

15 So these values are meaningless to the claims at issue,
16 and, in fact, I believe there's a concession that if you look
17 at this you can't easily translate these values into the claim
18 limitation values, and what they did was they gave a plate to
19 their expert to recreate some examples or some testing, and
20 I'll talk about that further. My basic point here is that
21 rather than giving records of what was actually on these
22 plates, what the support layer was, how it was made, what was
23 in it and what the optical properties were vis-a-vis these
24 claims, they're going back years, and during those years we
25 have got changes, which we don't know how they affect the

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1 optical properties, which are critical to the claims that are
2 at issue. And since it is their burden to provide written
3 contemporaneous corroboration to prove their defense by clear
4 and convincing proof -- not beyond a reasonable doubt, but by
5 clear and convincing proof -- it fails for those reasons.

6 Six, the specification for Cronar® that they point
7 to, which is Exhibit J, which I believe is from 1991, actually
8 says that the blue adhesive -- the blue adhesive coating is
9 what has the UV-absorbing material in it, and it is for
10 antihalation purposes. What the claims require, however, is
11 that the actinic radiation absorbing material or compound must
12 be in the support itself. And Your Honor may recall that --

13 THE COURT: Did you ask anybody whether this means
14 that the coating, whether the adhesive coating contains the UV
15 absorber, leaving aside for antihalation purposes.

16 MR. HORVACK: I don't recall, Judge.

17 THE COURT: Because I don't know that you did. The
18 blue adhesive coating polyester film with a UV absorber for
19 antihalation. You can read it either way. It does not
20 necessarily mean that the adhesive coating has the UV
21 absorber. It can easily be read the blue film has the UV
22 absorber, and the adhesive helps you to stick it on to the
23 upper layer.

24 MR. HORVACK: I don't know if that's the best
25 interpretation. I suppose it is one interpretation, I would

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1 say, though, in contrast to that, it is describing the blue as
2 the adhesive, and it is the blue portion that has the UV
3 absorber, as you have established with my esteemed colleagues,
4 and, so, I believe the better interpretation -- and,
5 certainly, for summary judgment purposes, a reasonable
6 interpretation is this old 1991 spec sheet for raw materials
7 is describing an adhesive that has the UV absorber in it.

8 THE COURT: I can diagram that sentence for you, and
9 the only reasonable interpretation of that is "blue" and
10 "adhesive-coated" modifies the noun "film."

11 MR. HORVACK: Agreed.

12 THE COURT: Fine.

13 MR. HORVACK: I agree with you. I agree with that.
14 So I would construct it and diagram it the same exact way. It
15 is where the UV absorber, which comes back to --

16 THE COURT: Which modifies "film" not "adhesive."

17 MR. HORVACK: Well, okay. English grammar may have
18 that interpretation. I would say here where it says, "blue
19 adhesive," and we know the UV absorber is blue because Dr.
20 Henderson has told us that, it is the coating on the film that
21 has the UV absorber because that's the blue part. So I
22 understand your interpretation. My interpretation says "blue"
23 means UV absorber, go see Dr. Henderson, number one. Number
24 two, it is for antihalation purposes. We know according to
25 the patent at issue that antihalation was for analog plates

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1 because it was dealing with a front exposure problem. And we
2 know that in the prior arts, adhesive coatings on the support
3 dealt with that problem. And, so, for all of those reasons
4 that is entirely distinct and different than the claimed --

5 THE COURT: And tell me again, I seem to have a
6 mental block for antihalation.

7 MR. HORVACK: Sure. So for front exposure, there's
8 the -- I can go all the way back, I suppose. For front
9 exposure --

10 THE COURT: Of an analog plate.

11 MR. HORVACK: Right. Well, assume that there's no
12 black here, and we're -- what we have here is a --

13 THE COURT: You have got a photo negative.

14 MR. HORVACK: Yes. Assume that, okay? And there's a
15 release layer in there, as well. What happens is that the
16 light comes down and will actually bounce off of the interface
17 between the photocurable or the photopolymerizable layer and
18 the support. It will bounce, and it will actually come into
19 the areas in which it needs to stay uncured or not hardened,
20 so it is doing a bad thing. It is bouncing, and it is coming
21 back up and curing what should remain uncured.

22 And the effect of that is it creates a halo around the
23 base of the support, which will improperly raise the total
24 relief of this, which will distort what you actually want to
25 print.

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1 And, so, what they did, what this 1991 spec sheet is
2 describing is they put a coating on top of the support layer,
3 which did have a UV absorber in it, a blue adhesive, and it
4 would capture -- it would capture the front exposure UV light
5 and not allow to it bounce back up. It would get captured in
6 the support adhesive layer on top of it and not give you -- it
7 would prevent halos, and, therefore, it was antihalation.

8 THE COURT: Oh, halo, halation. Light rays.

9 MR. HORVACK: Right.

10 THE COURT: And that is for your analog deal,
11 correct?

12 MR. HORVACK: Correct. That's right.

13 THE COURT: You'll have to refresh me on this. Is
14 antihalation a concept that you need to deal with when you are
15 doing a digital process?

16 MR. HORVACK: I think the answer is theoretically,
17 yes.

18 THE COURT: Still?

19 MR. HORVACK: Yes. Because you're doing front
20 exposure, and instead, you're going through an in situ mask as
21 opposed to a phototool in the release layer, and you might
22 have the same phenomenon.

23 THE COURT: So it deals with front exposure of the
24 plate.

25 MR. HORVACK: And it does not deal with back

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1 exposure, which is the focus of the claims at issue. And, so,
2 when it talks about an adhesive that's blue for antihalation,
3 and we know the UV absorber is blue, I believe the best, and,
4 certainly, a reasonable interpretation of this is that it has
5 absolutely nothing to do with the patent at issue.

6 Secondly, and I touched upon this briefly, reason
7 number seven focuses on this entry of the spec having a UV
8 absorbance at 350 nanometers with values 1.38 to 2.3 or so.
9 So your claim construction with respect to actinic radiation
10 is not at 350 nanometers. It is the actinic radiation waves
11 which create a change in this very complex photocurable layer,
12 number one. And, number two, as relates to Claim 18 in
13 particular, we have got a call-out of a precise range of 300
14 to 400 nanometers. That is different, obviously, than the 350
15 nanometers spec here.

16 THE COURT: 350 is more precise than 300 to 400.

17 MR. HORVACK: It totally is, but you get different
18 values since you're looking at a broader range.

19 And then finally --

20 THE COURT: In the patent. 300 to 400 gives you a
21 different range of readings.

22 MR. HORVACK: You're looking at a broader in
23 different range than the precise 350. So that's two. The
24 final point is these UV absorbance values, as Mr. Ossola, I
25 believe said, are logarithmic and they don't translate to

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1 UV-absorption values that we have in the '835 patent. And,
2 so --

3 THE COURT: You have an expert to check that and then
4 subject that article to other testing?

5 MR. HORVACK: Yes. With respect to the points that I
6 made, I believe there's been concessions in open court today
7 about them, so these particular values do not translate into
8 what's at issue in the patent limitations.

9 THE COURT: Not without an expert.

10 MR. HORVACK: And they have an expert, and they
11 haven't translated them at all. And if I go further --

12 THE COURT: You're quite convinced in your head, but
13 you're not getting through to me.

14 MR. HORVACK: Oh, okay. Well, if you just look at
15 it, Judge, you see it is UV absorbance, so what the claims
16 relate to is percentage of actinic radiation that's being
17 absorbed, number one. So those are two different looks. UV
18 absorbance, and, I believe, again, what Mr. Ossola said is
19 that's a logarithmic function. And, number two, the claims
20 look at how much of the actual light that's used to back
21 expose is being captured by the support layer. How much gets
22 through and how much gets captured.

23 Number two, the claims look at percentage values like
24 80 to 99 percent. This looks at values which are 1.9 to 2.3.
25 So there's no translation between 1.9 to 2.3 and what the

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1 percentages are in the claim; i.e., 80 to 99 percent. And
2 then finally, again, what's here is focused on the single
3 wavelength 350 nanometers. What's at issue in the patent is
4 actinic radiation, which was construed to mean that which
5 creates a change in the photopolymer, and then 18 clearly
6 calls out 300 to 400 nanometers. So on three fronts we have
7 something fundamentally different between what's in this
8 document from 1991 and what's in the claim limitations of the
9 patent at issue.

10 So we ask DuPont the question:

11 "Do you know what the UV absorption percentage was of
12 the Cronar® 773x on the DPS 45 plate that was sold to Banta as
13 reflected in those invoices?" And we're talking about the
14 Banta invoices.

15 "No, I don't."

16 So DuPont itself --

17 THE COURT: That's Taylor, though. Then they hire an
18 expert, Henderson, who says, I have a sample plate. It was
19 good. It is contemporaneous to those days. I have measured
20 it. It meets the manufacturing specs. Now I have tested it
21 for absorption, and, lo and behold, it is 94.6.

22 MR. HORVACK: Now I understand your question. I
23 agree, and I will get to Henderson. I was just focusing on
24 the document itself in DuPont's own testimony with respect to
25 that document. So DuPont -- so facially there's three very

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1 distinct differences, one. And then, two, DuPont can't make
2 the correlation or translation itself by looking at its own
3 spec and what's claimed in the patent. And I agree that they
4 tried to fill the gap with Henderson, and I will speak to that
5 in a moment.

6 THE COURT: So the three things on this spec sheet,
7 going back to your Slides 30 and 31, is the description of the
8 film at the top.

9 MR. HORVACK: Yes.

10 THE COURT: And then the UV absorption at 350. And
11 what's the third thing that gives you?

12 MR. HORVACK: UV absorbance versus percentage of
13 actinic radiation that's absorbed.

14 THE COURT: Oh, I see. I see the other half of that
15 same line.

16 MR. HORVACK: Yes, exactly. And then the final thing
17 is the 1.3 to 2.3 values in the spec sheet versus the 80 to
18 99 percent, which is called out in the claims.

19 So I guess in total with respect to J there's four
20 reasons why this document from six or seven years earlier does
21 not corroborate their story. One is the blue in the UV
22 absorber in the top. Two is it calls out UV absorbance, which
23 is not percentage of actinic radiation. Three is that it
24 focuses solely on one wavelength, 350. The claims do not.
25 And, in particular, 18 gives a range of 300 to 400. And then,

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1 finally, the values in the spec sheet 1.93 to 2.34 do not
2 correlate to 80 to 99 percent absorption.

3 THE COURT: Not on their face.

4 MR. HORVACK: Not on their face. Absolutely. I
5 agree.

6 THE COURT: Okay. Go ahead.

7 MR. HORVACK: So, again, we asked the question of
8 DuPont, and they cannot translate it for us during the
9 30(b)(6) binding testimony, I may add.

10 So going to the next document, and I promise we'll
11 get to Dr. Henderson. It is just not in that order here.

12 THE COURT: That's fine.

13 MR. HORVACK: So with respect to Exhibit K, this is
14 the research report itself, indicates that this film -- at
15 least in January of 1991 -- showed significant variability in
16 UV absorbance. And they say, Well, ignore that, don't focus
17 on that too much. That might hurt me if you did, but I submit
18 to you it's their burden to prove written corroboration that
19 the elements of the claim is absolutely met, which requires
20 uniformly distributed throughout the layer.

21 THE COURT: They say this was just, you know, one
22 effort, and then gradually they got it down to uniformity.

23 MR. HORVACK: That's their testimony. The document
24 indicates that sometimes they got it and sometimes they
25 didn't. So as it relates to the plates at issue, which are

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1 six or seven years later, they didn't corroborate that they
2 got it because there's evidence that they didn't get it at
3 various points in time. And, so, there's uncertainty, and
4 when there's room for doubt, the law says that their motion
5 should be denied, and at trial I will submit that their
6 defense should be directed against them, but that's a
7 different issue. But, certainly, in this motion they can't
8 satisfy their heavy burden with an internally contradictory
9 document.

10 I, the manufacturing, open quotes, "recommendation,"
11 end quotes. There's a number of reasons why this does not
12 corroborate anything. The first is that they tell you that
13 the products EXP DD or EX, whatever they may be, were made in
14 Germany. This recommendation is coming out of New Jersey.
15 There's nothing in this document which says this is a
16 manufacturing recommendation for Germany. It is coming
17 facially out of Parlin, New Jersey.

18 THE COURT: Can I just stop you there for a second?

19 MR. HORVACK: Sure.

20 THE COURT: I know that. And I'll ask DuPont about
21 that in a minute.

22 MR. HORVACK: You saw that, too. You noticed that,
23 too?

24 THE COURT: What?

25 MR. HORVACK: That the document was coming out of New

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1 Jersey.

2 THE COURT: Sure. You know, and they even say it in
3 their brief, but I did have a question for you on that.

4 Give me a second, please. I know what I am looking
5 for, and I shall find it.

6 MR. HORVACK: This is I to, I believe, Dr. Taylor's
7 declaration.

8 THE COURT: Taylor's declaration if you go to J,
9 Exhibit J for a second.

10 MR. HORVACK: Yes. That's the document we just spoke
11 about.

12 THE COURT: Right. But back into it for a second.
13 If you turn to the bottom of the page number that ends in 746.

14 MR. HORVACK: Yes.

15 THE COURT: Okay. And I'm reading out of context
16 here, obviously, because we're in the middle of this document,
17 but, of course, J is the raw materials spec --

18 MR. HORVACK: Yes.

19 THE COURT: -- for the Blue Base.

20 MR. HORVACK: I believe it is a blue adhesive.

21 THE COURT: Whatever it is. "Supplier, DuPont
22 Imaging Department, Brevard, North Carolina. Plants and use:
23 Parlin, Neu-Isenburg." So they're linking up your New Jersey
24 facility and your German facility to do the Cyrel support
25 layer for you. That wasn't pointed out by DuPont, but we

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1 spotted it as we went along.

2 MR. HORVACK: Judge, I think that's a fair point. I
3 have no doubt that this blue adhesive absorbing coated film
4 was used both in Parlin and in Germany for the analog plates
5 for antihalation purposes.

6 THE COURT: You say "analog plates."

7 MR. HORVACK: Because it says, "antihalation."

8 THE COURT: But you just told me when you were giving
9 me a little tutorial a minute ago that antihalation can be an
10 issue for digital plates, too.

11 MR. HORVACK: I don't retract that, but in 1991 there
12 were no digital plates.

13 THE COURT: That's true. Okay.

14 MR. HORVACK: Okay. We know that this is designed
15 for analog plates. I don't think anyone -- I don't even
16 believe they would suggest otherwise. They're simply saying
17 we had it for analog plates in the warehouse, and trust us, we
18 put it on this DPS 45 set of plates, which were sold three
19 times in the U.S.

20 THE COURT: And worked fine.

21 MR. HORVACK: It worked great. Believe me. It is
22 true. So, as it relates to this, okay, the supports were used
23 in both Germany and New Jersey.

24 With respect to I --

25 THE COURT: According to the same specs. They say

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1 you have got to follow these specs in our plants, and here are
2 our plants that are making this in 1991.

3 MR. HORVACK: Yes. I agree.

4 THE COURT: Okay.

5 MR. HORVACK: So with respect to I, coming back,
6 facially it is New Jersey, although they say these plates are
7 made in Germany. Second, it is a recommendation, and there's
8 no proof --

9 THE COURT: The plates are made there. I don't know
10 whether the support layer is made there. My sense of this is
11 that the support layer comes from probably that plant in North
12 Carolina, gets shipped to Parlin and to Germany to DuPont's
13 facilities, and then it gets assembled there into a three- or
14 four-layer plate.

15 MR. HORVACK: I think you're right. I think you're
16 right. So the question, though, is was that support from
17 North Carolina, had the material uniformly distributed
18 throughout put on to these DPS plates, which were sold three
19 times. And this particular document does not indicate that
20 this recommendation was followed for these particular
21 products.

22 Further, it can't possibly be, given the dates on the
23 document, that it was followed for the 1997 sales because the
24 date approved is February 8th, 1998. And, so, the initial two
25 sales in late 1997 couldn't possibly be following this

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1 recommendation; the recommendation didn't even exist. It was
2 typed, completed the last day of 1997 and only approved
3 February of 1998. So then as it relates to the final sale
4 that they rely upon, the third in May of 1998, well, okay, I
5 guess maybe it is possible that this could have been --

6 THE COURT: Okay. That will do, won't it?

7 MR. HORVACK: No possibilities here. Because the
8 other possibility is equally true, and that is that the
9 products that were sold in May were in inventory and
10 manufactured before February of 1998. So with their burden
11 they have satisfied nothing as relates to this particular
12 exhibit. Does it apply to Germany? We don't know. Was it
13 followed for the plates made in Germany? We don't know. It
14 is a recommendation. Further, it couldn't possibly be for the
15 first two because it didn't exist after all. And, third,
16 there's room for doubt as relates to the third.

17 So here's the point where you were at previously,
18 which relates to Dr. Henderson. So all of those documents
19 currently as it comes to play out DuPont agrees that the
20 documents do not meet Claims 16 through 18, 24 to 27, and, so,
21 in comes their expert Dr. Henderson. Dr. Henderson is a hired
22 expert. He is a very nice man. But he was provided a plate
23 by Dr. Taylor, and Dr. Taylor told Dr. Henderson this is a 45
24 DPS plate. It was manufactured, open quotes, "around
25 September of 1998," end quotes, and it is from this particular

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1 batch. Dr. Henderson, of course, has no reason to doubt Dr.
2 Taylor, but the law does.

3 So Dr. Henderson does testing on this plate, and he
4 comes to some conclusions. I say that where are the documents
5 that prove essential chain of custody legal type foundational
6 evidentiary matters for this particular case? For example,
7 where's the proof that this particular plate came from that
8 batch? Where is a photo of the box? Where --

9 THE COURT: You asked?

10 MR. HORVACK: I did. We don't know. We have
11 nothing. Certainly, there's nothing in the record.

12 THE COURT: Taylor said he kept a box.

13 MR. HORVACK: I agree. I totally agree. I would
14 like to know where the box is and whether it is missing a
15 plate or not.

16 Secondly, how do we know, and where is the document
17 that says that Dr. Henderson's tested plate was manufactured
18 before October 11th, 1998? Suspicious at best; deceptive at
19 worst when they say "around September of 1998."

20 THE COURT: And I'm sure that you zeroed in on that
21 with Taylor, but I haven't seen it in the excerpts that you
22 have given me, either side.

23 MR. HORVACK: This declaration was filed in the
24 summary judgment, and I deposed Dr. Taylor before that. I
25 promise you that if I had this declaration before me I would

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1 have asked him. I didn't have it. It didn't exist. It
2 wasn't in the record, and so I didn't. I, certainly, asked
3 him many questions about -- and Dr. Henderson in particular --
4 about the 45 DPS plate that he tested. Dr. Henderson says it
5 was given to him by Dr. Taylor, and he told him X, Y, and Z.

6 THE COURT: All right. I understand.

7 MR. HORVACK: So when they declare it is around
8 September of 1998 that could be before or it could be after
9 the critical date, October 11th, 1998. It is suspicious that
10 they use "around." I would suggest to the Court given their
11 burden here doubts do not bode in their favor. It requires
12 denial.

13 The final, and most important point in my view, is
14 that where is the documentary connection that this plate,
15 wherever it was made, whenever it was made is, in fact, just
16 like, made with, and in the same way as those plates that were
17 sold to Banta and Cage Graphics? Where is the connection?
18 Where is the formulation records, manufacturing records
19 with -- about this plate that was tested and has values,
20 apparently, according to the patent claims, where is the
21 connection that that is just like the precritical date sales?
22 I submit there's none. With none it is denied. With none, as
23 we get to trial, the issue would be taken from the jury, and I
24 will ask you to do that. At this point it should simply be
25 denied.

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1 THE COURT: Let me just tell you, if this issue
2 survives this motion, I have an invariable practice that I do
3 not take from the jury until after the jury has come out with
4 its verdict, and then I go back and I deal with the Rule 50
5 motions.

6 MR. HORVACK: That's the proper practice. It would
7 be the practice of the lawyer to stand up, nonetheless, with
8 recognition of what you're going to do and ask, nonetheless,
9 knowing it is a sure fire loser.

10 THE COURT: No, it is just reserved.

11 MR. OSSOLA: Your Honor, I apologize to Mr. Horvack,
12 but do you mind if we took just a short break?

13 THE COURT: Yes. Sure. And I think it is a Rule 50
14 motion on civil practice.

15 MR. HORVACK: Yes.

16 THE COURT: Okay. Fine.

17 MR. OSSOLA: I appreciate the Court's indulgence.

18 THE COURT: No problem.

19 (Break taken from 4:38 to 4:48 p.m.)

20 MR. HORVACK: So as I indicated, the first issue,
21 written corroboration, I have 10 separate reasons for denial.
22 I have gotten through all 10 of them.

23 The second point is W.L. Gore, and it relates to the
24 method claims, and the point here is that even if the record
25 fully corroborated their version with respect to 45 DPS, that

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1 it satisfied all the requirements of the product aspects of
2 the claims, the method claims 13 to 18 would still not be
3 invalid, and that's because Dr. Taylor, according to his own
4 declaration, completed the customer jobs inside DuPont's
5 facility. In other words, he took the raw plates, he back, he
6 front, he laser ablated, et cetera, and he sent the finished
7 plate to be used by the customer however they wished. But
8 when you look at this plate, this finished plate, you can't
9 tell how it was made.

10 THE COURT: How about the fact that Taylor had
11 customers walking through his facility and they were
12 demonstrating the making of a plate?

13 MR. HORVACK: Right. How it was made, what's in it,
14 and, in particular, what the support layer is made of and
15 consists of, particularly given that there's claim limitations
16 with respect to optical properties of this support. So if
17 those passers-by could somehow figure out that there was a
18 Blue Base and it had Tinuvin® and all of the things that they
19 say, I don't think so.

20 So W.L. Gore says a non-patentee's non-public use of
21 the process is not a bar, even though the product itself was
22 sold or publicly used before the critical date. So, in other
23 words, everything needs to be in the public domain in order to
24 satisfy the method claims. If one thing is not, or a group of
25 things are not, it is not. And the critical point of Gore is

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1 when you look at the ultimate product can you figure out how
2 it's made and what's in it, and the process associated with
3 that, and I submit to you looking at these plates, that is an
4 impossibility.

5 THE COURT: Well, you and DuPont have a difference of
6 opinion as to how this law works.

7 MR. HORVACK: I gathered that. And, so, I know that
8 you're very adept at reading these cases, and you're going to
9 figure out who's right. But I agree with you. We have a very
10 distinct interpretation and difference as relates to W.L.
11 Gore.

12 The third issue is, okay, if they, indeed, had a
13 written corroboration for what was in DPS 45, in particular
14 what the support was, the question still remains under the
15 Rule of Reason whether that's sufficient to meet this very
16 high clear and convincing standard. And the Federal Circuit
17 has created factors as they like to do, and I submit to you
18 that if you apply these factors you are going to come to the
19 conclusion that it is not sufficient, number one.

20 Number two, at a very bare minimum there's a jury
21 question as relates to this because Dr. Taylor is essential to
22 their defense. It turns -- their defense -- in large part on
23 the veracity of Dr. Taylor. For example, going back to Dr.
24 Henderson, well, was what was given to Dr. Henderson a DPS 45
25 plate which was identical to the invalidating sales or not?

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1 Dr. Taylor says it was without any documentation. And, so,
2 under the Rule of Reason you ask these various questions:

3 First, is he an interested and biased witness? Well,
4 my goodness, he is. He has been employed by DuPont for years,
5 decades. And, by the way, in the past he has received
6 financial rewards from DuPont for his participation in
7 litigation matters. He is distinctly interested and biased.

8 Two, as relates to certain things he is wholly alone
9 on an island. So for example, this issue, which is important
10 to Your Honor about the plate and Dr. Henderson's testing of
11 it, who else but Dr. Taylor says I had this plate in my lab
12 for years. It is a 45 DPS. It has Cronar® 773x on it, and it
13 is identical to the gauge in Banta sales. Nobody does that
14 but Dr. Taylor. There's no other declaration. And there's no
15 documents.

16 So the Supreme Court rightly says the truth is rarely
17 found in the unsupported testimony of one individual,
18 particularly when they have a financial interest in the
19 outcome. This factor bodes in favor of denial.

20 Third, did he find himself or was he in a position to
21 actually know what he says to be the case as relates to 45
22 DPS? He clearly did not. So if you look at the manufacturing
23 recommendation, which I believe is I, Exhibit I, he is not on
24 that document. You see Dr. Fan, you see Dr. Chiu. You see
25 others. There's no Dr. Taylor on the face of that document.

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1 He did not conceive, design, formulate, or manufacture this
2 product, period. What he did do was process these plates.
3 That does not tell you what the plates are made of or how
4 they're made. He was not in a position to know, and those who
5 were, remarkably, did not file a declaration in this court of
6 law. Factor in favor of MacDermid.

7 Further, because he doesn't know, he engages in rank
8 speculation. He looks at back exposure times and infers what
9 the support is or is not. And with respect to this particular
10 document G, indeed, there are some which have longer
11 exposure -- back exposure times than others. He infers from
12 that, without any personal knowledge, that, therefore, they
13 must have a UV-absorbing substrate or support layer.

14 Well, I submit to you that there's others in the same
15 document which would -- if you want to engage in
16 speculation -- would suggest the exact opposite. There's
17 20 seconds for this particular plate of 45 DPS-2. And, so, if
18 you want to engage in speculation, we can speculate that some
19 did, some didn't. Which of those made it to the sales?

20 THE COURT: Is 20 seconds too short to have
21 absorption?

22 MR. HORVACK: It is. Yes. If you look at the patent
23 at issue, you're going to see that 30 seconds or less is too
24 little and suggests that there's no UV-absorbing material in
25 the substrate. And he does the exact -- he agrees with that

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1 logic because he did the exact opposite inference with longer
2 back exposure times.

3 Again, I noticed he was unsupported by his colleagues
4 such as Dr. Fan and others.

5 So, in conclusion, he is the sole declarant with
6 respect to very precise matters, which occurred nearly 15
7 years ago, and, by the way, he has a financial interest, and
8 he wasn't personally involved. Factors under the Rule of
9 Reason in favor of MacDermid.

10 Further, Dr. Taylor was, as Mr. Ossola was suggesting,
11 involved in expanding the use of digital back before the
12 critical date. He produced, published some papers, which are
13 G and H. Not one of them talk about a specialized support
14 being used on their plates or using back exposure steps with
15 that specialized support. Again, if it were true and a
16 particular feature of importance to them you would think that
17 his publications would have it in there. There's no
18 reference.

19 THE COURT: Why didn't at deposition you ask him --
20 I'm not asking for your strategy; I just couldn't understand
21 why this was in the papers about his, you know, digital is the
22 future article and a presentation that he made similar to that
23 article, and then he says, well, Dr. Fan also made a
24 presentation to that FTC or somebody.

25 MR. HORVACK: FTC.

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1 THE COURT: I didn't follow that at all.

2 MR. HORVACK: I think that might have been in the
3 other case, Judge, to be honest with you.

4 THE COURT: No, no. It is in these motion papers.

5 MR. HORVACK: It could very well be that we were
6 establishing that both of their publications do not establish
7 the story now, which is that they used the specialized support
8 layer of the '835 patent before the critical date. My
9 recollection of this is fuzzy.

10 THE COURT: That's fine. Move on.

11 MR. HORVACK: Okay. Bottom line is his writings
12 didn't include what he says now, and you would expect that
13 they would.

14 Further, they have, as you know, a wide, vast patent
15 portfolio. They like to use it often. And with respect to
16 digital they have a number, and none of those digital
17 plates -- withdrawn.

18 None of those digital patents make any mention
19 whatsoever of utilizing the specialized support to absorb UV
20 radiation for back exposure purposes, and that is suspicious
21 at best. So the chart here talks about, you know, whether
22 imaging and oxygen, this O², is talked about or not whether
23 good or bad. And you'll see that there's opposite teachings
24 in their patents versus ours. They say imaging and oxygen is
25 not good. They actually suggest away from it. We say it is

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1 present and good, but you need to manage it. So while they
2 say they invented this, they're actually teaching the opposite
3 in their patent portfolio.

4 With respect to the back exposure times we say short
5 ones are bad, they're not good. They say they're acceptable,
6 and they actually use back exposure times of small seconds,
7 three to five seconds.

8 Finally, with respect to the UV-absorbing material
9 and the substrate we say obviously good, we claim it. They
10 don't address it at all. Period.

11 THE COURT: Are these prior patents or subsequent
12 patents?

13 MR. HORVACK: They're both. It spans.

14 THE COURT: I saw them all.

15 MR. HORVACK: It spans a very good period of time
16 before and after. I don't know. It is their invention. They
17 don't teach it. They didn't claim it. They know how to do
18 those things. Under the Rule of Reason Woodland Trust factors
19 that bodes in our favor.

20 THE COURT: Which factor?

21 MR. HORVACK: The factor about the credibility or
22 veracity of their testimony in contradiction or impeachment of
23 the witness' testimony in particular, so four. So they say it
24 is ours, but they actually have teachings to the contrary, and
25 they never talk about it.

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1 So 19. Their literature, which they actually submit
2 to you in Exhibit F goes through the process steps with
3 particularity. Says laser image it, make the mask integral,
4 and then plates are then main exposed through the integral
5 mask then washed out in conventional solvent processing.

6 THE COURT: Where's the back exposure?

7 MR. HORVACK: That's my point.

8 THE COURT: Yes, but their little operator's manual
9 thing with the machine contemporaneous, I think dated
10 January 1998 --

11 MR. HORVACK: Okay.

12 THE COURT: -- says on page -- you know, this chart
13 that everybody has seen says, zap it on the back and lay your
14 mask; zap it on the front then clean it out.

15 MR. HORVACK: Right. Agreed. And you noted that
16 DuPont at that point in time was selling other plates, not
17 just DPS, so DPU. I will just submit to you that as it
18 relates -- so that's a general manual. As relates to this
19 particular plate; i.e., the one that they're saying
20 invalidates my client's patent claims, their product
21 literature for that product does not have back exposure
22 teachings and includes then, which would suggest that there's
23 no required interim steps.

24 THE COURT: I'm sorry, what product literature for
25 what product, the DPS product?

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1 MR. HORVACK: Yes.

2 THE COURT: The DPS plate?

3 MR. HORVACK: Yes.

4 THE COURT: Okay. That's not your Slide 50. It is
5 some other slide. Oh, I see. The product literature for the
6 DPS. Go to F. Different exhibit, yes.

7 MR. HORVACK: So you see it is from 1997 they get
8 some award for technical innovation, and then they teach their
9 customers how to use it. So under the process of use on the
10 next page the process of use that they're telling their
11 customers to use does not include a mandatory required step of
12 back exposure. It actually doesn't even include it. And then
13 if you go to their product literature now, our Exhibit I, lo
14 and behold, for their infringing products they teach a back
15 exposure test. They teach and direct their customers to use a
16 back exposure step.

17 THE COURT: Expose the plates from the back.

18 MR. HORVACK: That's right. This, obviously,
19 suggests they did not invent what's claimed in the '835
20 patent. They simply have copied it.

21 THE COURT: Well --

22 MR. HORVACK: A reasonable juror would infer that
23 they didn't invent what's been claimed, they copied it. A
24 fair and reasonable juror could reach that conclusion.

25 THE COURT: But that's not before me today.

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1 MR. HORVACK: In part it is. You need to decide if
2 there's a jury question, and if a fair and reasonable juror
3 could find that they didn't invent it, they copied it, and the
4 story about DPS 45 is not credible, that's a jury question and
5 it needs to go there, and if it is before you, you need to
6 deny the motion for summary judgment and let them decide who
7 is right and --

8 THE COURT: What is before me is whether they had
9 your invention on sale and in use before the critical date.

10 MR. HORVACK: I agree. I agree. And this is just
11 that they did not because their product literature before does
12 not teach back exposure, and after it does.

13 Final issue is Claim 27, and, so, firstly, they
14 didn't corroborate what 45 DPS is, and, therefore, just like
15 all the other claims, Claim 27 survives, as well.

16 Secondly, they concede it is not literally anticipated
17 by 45 DPS, and literal anticipation is what's required under
18 102(b). We all know strict identity is required. The test is
19 just like literal infringement just with a different temporal
20 look and view and that the 102(b)/103 bar that they cite to
21 relies upon, as it relates to patentability, is not used in
22 courts of law, period. It is a hybrid doctrine, which is
23 sometimes used in the patent office, and in In Re: Smith it
24 proves out that that was okay for the patent office to do
25 that. Courts of law need to follow Graham and KSR and the

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1 tests set out in 103 if there's no literal anticipation.

2 With respect to Graham, here, if one did apply them,
3 which they did not because they relied upon this hybrid
4 doctrine, you would have to find that they didn't establish
5 the scope and content of the prior art because they didn't
6 corroborate properly 45 DPS in the prior art.

7 Number two, there's no definition in Dr. Henderson's
8 report about what the level of ordinary skill in the pertinent
9 art is or should be or what his view on that is, and you
10 absolutely, of course, need that because you're adjudging
11 obviousness through that lens. Is it a highly technical very
12 smart person or not so? It depends. It is critical to the
13 inquiry. They have not established that, nor did they
14 establish any reason under KSR to make the combination or
15 adjustments that they seek. And then they wholly ignored
16 secondary factors.

17 The issue about Dr. Shock I find intriguing. Dr.
18 Henderson says, Well, Dr. Shock around the same time period as
19 Dr. Kanga came to the same view. Well, the evidence of -- on
20 those points are as follows. Dr. Kanga began a program with
21 respect to Melinex, and he established and created a plate
22 Melinex 6248-700. Dr. Shock admits that he afterwards began a
23 project with Melinex, and he used Dr. Kanga's support, Melinex
24 6248-700, as his starting point. How convenient for him. He
25 used Dr. Kanga's work.

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1 THE COURT: 965 is Kanga's or is there a question
2 about that?

3 MR. HORVACK: So the conventions were that Melinex
4 6248-700 was sort of the experimental number. And then it
5 turned into their Melinex, which I believe is 965. So the
6 chronology is Kanga is working with Melinex to develop a
7 UV-absorbing specialized substrate. Dr. Kanga -- excuse me,
8 Dr. Shock follows in his wake and begins his project with Dr.
9 Kanga's support film 6248-700. And there's admissions in the
10 record that Dr. Shock suspected that that was, in fact, the
11 case.

12 Further, there's a document, an e-mail from May of
13 2000, which indicates that Dr. Shock would like some of my
14 client's plates to do some analysis and that he recognized
15 that PTI, which is Polyfibron, the predecessor to MacDermid,
16 was already working with Melinex to make an improved UV base,
17 and, so, he wanted some of our plates. He further testified
18 that he analyzed our plates, and he did that because in his
19 view at this point in time, 2000 or so, MacDermid had gained a
20 technical advantage or edge over DuPont, and he was designated
21 to overcome that. So I submit to you that Dr. Shock proves
22 nothing other than he copied, replicated my client's
23 invention. It certainly doesn't corroborate anything other
24 than that.

25 THE COURT: Melinex 965 is DuPont's support layer,

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1 yes? Are you there?

2 MR. HORVACK: I'm here. I think the answer is yes.

3 I just don't want to answer incorrectly.

4 THE COURT: On Slide 56 --

5 MR. HORVACK: Yes.

6 THE COURT: -- I would like to correct a typo that
7 you've got there that I see too often to pass it by, which is
8 you say in your second bullet point, "ultimately this program
9 lead (sic) to the development..." see that? Second bullet
10 point on Page 56.

11 MR. HORVACK: I see that.

12 THE COURT: This is the kind of thing that I daydream
13 about. It is not spelled L-E-A-D. L-E-A-D is the present
14 tense of lead. The past tend of lead is L-E-D.

15 MR. HORVACK: You're right.

16 THE COURT: You're talking about a heavy metal maybe
17 you would spell it L-E-A-D. Thank you. That's the only thing
18 I absolutely needed to mention. But since I was looking at
19 that, and you were going on about Melinex 965, it is just a
20 support layer?

21 MR. HORVACK: It is.

22 THE COURT: And is it --

23 MR. HORVACK: It has UV-absorbing properties.

24 THE COURT: Is it a DuPont item?

25 MR. HORVACK: Yes.

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1 THE COURT: Is it a patented DuPont item?

2 MR. HORVACK: Since it infringes our patent, yes, but
3 not by them.

4 THE COURT: Excuse me.

5 MR. HORVACK: It is covered --

6 THE COURT: A patent by you, according to you. So is
7 this one of the accused devices in this lawsuit?

8 MR. HORVACK: I believe the answer is yes, but you're
9 testing my recollection, and I apologize, I'm not positive
10 about the number. I'm positive their Melinex films, which are
11 used on their plates, are infringing. I'm uncertain whether
12 they still use 965. They did. I don't know if they still do.

13 THE COURT: Okay. Fine.

14 MR. HORVACK: So the bottom line of the story here is
15 that their scientists followed our scientists, and that proves
16 nothing other than copying and certainly doesn't prove that
17 the claims are obvious.

18 So, in summary -- I think this is important -- as it
19 relates to all the claims corroboration, written
20 corroboration, which is contemporaneous, the first 10 points I
21 have made are lacking. Secondly, credibility is lacking.
22 So under the Rule of Reason, the Woodland Trust factors,
23 that's lacking. And DuPont forced me to reread Sandt
24 Technology, including the concurring opinion by Judge Dyk. I
25 would urge you to do the same. He is very clear that with

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1 respect to this particular type of defense it is rare, if
2 ever, that summary judgment should be granted because it is
3 turning, in large part, on the credibility of who, in fact,
4 invented the claimed invention, and that is, according to him,
5 a jury question at its heart and core.

6 Two, Gore demands denial with respect to the method
7 claims, as we discussed. And 17 lives no matter what.

8 Thank you.

9 THE COURT: Thank you.

10 MR. ALLEN: If I may, Your Honor, may I make a few
11 very quick rebuttal points?

12 THE COURT: Of course.

13 MR. ALLEN: I'm just going to try to go through this
14 really quickly and highlight a few of the key issues that we
15 would like to discuss.

16 THE COURT: Okay.

17 MR. ALLEN: So, first of all, on the corroboration
18 points, Mr. Horvack had bullet points number 2 and number 3
19 where he focused on the lack of or the alleged lack of
20 particular types of evidence that he, apparently, thinks is
21 necessary to prove a 102(b) case, and, in particular, the
22 manufacturing records, for example, Cronar® 773x are the
23 manufacturing records for 45 DPS. And I submit to you that
24 his requirement that a specific type of document is needed to
25 prove a 102(b) case is patently wrong. Sonoscan, for example,

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1 indicated that any relevant evidence may be used to prove a
2 102(b) case, such as memoranda, drawings, correspondence, and
3 testimony of witnesses. And that's exactly what we had
4 presented in our opening brief, and I have made a record
5 today, is we have relied on two types of oral testimony; Dr.
6 Taylor's declaration, as well as the 30(b)(6) testimony of
7 both Dr. Shock and Dr. Taylor. And then couple that with a
8 multitude of documentary evidence that corroborates the oral
9 testimonies of Dr. Shock and Dr. Taylor. And, again, we also
10 have the oral testimony of Dr. Henderson for a few specific
11 points and testing on those points, as well.

12 So that corroboration was given to you in our reply
13 brief in that Appendix 1 that you received later last week
14 because we mistakenly forgot to give it to you.

15 THE COURT: That's fine.

16 MR. ALLEN: So Appendix 1, again, as stated in our
17 letter brief, it just walks through each claim limitation and
18 then shows exactly on the record that we created in our
19 opening brief where you can find oral testimony and where you
20 can find documentary evidence supporting that oral testimony.

21 And if you may, Your Honor, we created for your
22 convenience a binder that has Appendix 1, and for each claim
23 limitation we pulled the documents for you for your
24 convenience. If you would like a copy of that, we could give
25 it to you. We have provided one to opposing counsel, as well.

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1 THE COURT: I have all these. I have all these
2 already in your motion papers.

3 MR. ALLEN: Okay.

4 THE COURT: Thank you.

5 MR. ALLEN: And then on bullet point number 4 of his
6 corroboration argument Mr. Horvack points to the 30(b)(6)
7 testimony and says, look, DuPont's deponent didn't know what
8 the formulation of Cronar® 773x was. As we made clear in our
9 reply brief, and MacDermid hasn't acknowledged today, is that
10 that 30(b)(6) testimony was of Dr. Taylor. Dr. Taylor was not
11 the person that was designated for that topic. Dr. Shock was,
12 and you if you read Dr. Shock's testimony, which is in
13 Appendix 1 in our brief, Dr. Shock clearly and unambiguously
14 described what the formulation of the Cronar® 773x support
15 layer was.

16 Dr. Taylor's knowledge is about the general structure
17 of the support layer. We never asked him, and he has never
18 even attempted to testify what the formulation is. He just
19 knows based on his experience at DuPont in working with these
20 45 DPS plates what the general structure is. The detailed
21 chemical information he may not know, but he knows that it has
22 a LAMS layer, it has a PLS layer, and it has a Cronar® 773x
23 support layer.

24 THE COURT: You're referring to Dr. Shock's
25 deposition testimony?

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1 MR. ALLEN: No, I'm referring to Dr. Shock's 30(b)(6)
2 testimony, which was Exhibit A to the Allen declaration in our
3 opening brief. Dr. Shock's testimony goes up through about
4 early Page 100; I think we highlighted this in our reply brief
5 where the cutoff was, but it is escaping me right now.

6 THE COURT: Bear with me, counsel. I think I have
7 all the motion papers in front of me. Needless to say, I
8 don't have the appendix that you have assembled and offered to
9 me today, other than the chart of the appendix. I don't have
10 the materials that you're referring to in the appendix. You
11 just said to me that Dr. Shock, who was involved in
12 formulating the DPS 45 unambiguously described what the
13 formulation of the support layer was --

14 MR. ALLEN: Yes. That's correct.

15 THE COURT: -- in his 30(b)(6) testimony, right?

16 MR. ALLEN: That's correct.

17 THE COURT: And I'm looking at this, your chart, your
18 appendix to your reply brief, and I'm wondering where Shock is
19 referred to there. Allen declaration Exhibit D. Allen
20 declaration Exhibit D attached. Hang on just a minute.

21 I'm looking at Allen declaration Exhibit D, which is
22 a 30(b)(6) deposition on December 8, 2011.

23 MR. ALLEN: That's correct, Your Honor.

24 THE COURT: Is that Dr. Shock?

25 MR. ALLEN: Part of it is.

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1 THE COURT: Go ahead.

2 MR. ALLEN: Part of that testimony is. This is a
3 combined record of both Dr. Shock's 30(b)(6) testimony and Dr.
4 Taylor's. They are all combined into one transcript that just
5 had continuous page numbering.

6 THE COURT: Well, I know Dr. Taylor was 30(b)(6)
7 deposed on December 7, 2011, because the excerpts of his dep
8 that are in MacDermid's declaration submitted by Mr. Robinson
9 Exhibit N the questioner says, "Now, Dr. Taylor, let me ask
10 you this..." so I know it is Taylor there.

11 We'll take a moment.

12 MR. OSSOLA: Excuse me, Your Honor.

13 THE COURT: That's fine.

14 That's Taylor. On at least the excerpt that I have
15 in the Robinson Exhibit Declaration N from a 30(b)(6)
16 deposition on December 7, 2011. Your declaration, Mr. Allen,
17 docket number entry 166-2 that contains four exhibits, has
18 excerpts of depositions at Exhibit D, and it is a 30(b)(6)
19 deposition on December 8th, which is the next day, 2011, and
20 on Page 142 of these excerpts, again, the questioner says,
21 "Dr. Taylor, you testified," et cetera, so I surmised that all
22 of this excerpt was from Dr. Taylor, and if I'm wrong I have
23 nothing that you have given me to communicate that anyone
24 other than Taylor is speaking in this Exhibit D excerpt of
25 30(b)(6) deposition from December 8, 2011.

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1 MR. ALLEN: So if I may, just a few points. So,
2 first, the Robinson, the December 7th deposition that you're
3 looking at that's actually from the 30(b)(6) deposition of
4 DuPont in the DuPont versus MacDermid case --

5 THE COURT: Oh, okay.

6 MR. ALLEN: -- that MacDermid is relying on in this
7 case, as well.

8 THE COURT: I overlooked the caption.

9 MR. ALLEN: That's okay. So that's the first point.
10 So Dr. Taylor is the 30(b)(6) deponent in both of the
11 cases or 30(b)(6) designee, sorry.

12 THE COURT: Okay.

13 MR. ALLEN: And then on Exhibit D of my declaration I
14 agree it is a little unclear on who is testifying as to what.
15 I would have to confirm and get back to you, but I am certain
16 that we identified where the cutoff was. It may have actually
17 been in our response to their statement of facts and their
18 opposition. I'm certain that's where it is, actually, because
19 they relied on a few of these as undisputed facts, but I have
20 to confirm that.

21 Actually, I can make it easier for you. Do you have
22 Appendix 1 in front of you that we submitted? So I have a
23 footnote -- there's a footnote at the bottom of the first page
24 of Appendix 1 that states Dr. Shock's testimony is reflected
25 on Pages 1 to 104 and Dr. Taylor's is 105 to 176. Sorry for

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1 the confusion.

2 THE COURT: So your Exhibit D and your declaration
3 docket entry 166-2 has excerpted pages from Page 25 through
4 Page 142, but anything after Page 104 would be Taylor, not
5 Shock.

6 MR. ALLEN: That's correct, Your Honor.

7 THE COURT: Okay. Just a second, please. I'll tell
8 you when I'm ready.

9 So here is Shock. He is asked on Page 80 of his
10 deposition, "So what changes, if any, were made in the PET
11 Cronar® 773x prior to October 11, 1999?" I don't know whether
12 that's a misstatement. We all misspeak sometimes. I'm going
13 to assume that means October 11, 1998, but it doesn't matter.

14 MR. ALLEN: I think they're referring to '99. That's
15 the filing date of the patent and the critical --

16 THE COURT: Okay. Fine. And he says, "Well, it was
17 a continuously improved process to improve the performance of
18 that labor. While we always got good UV uniformity across the
19 web, I suspect that they wanted to improve maybe downstream
20 uniformity." And then he said, "I saw reports saying that the
21 uniformity had gotten better."

22 Then he is asked, "Did the amount of Tinuvin® 900
23 Cronar® 773x ever change prior to October 11, 1999?"

24 And he said -- and this is quoted, of course, in their
25 motion papers, the other side's -- "I can't be certain. We

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1 had goals, we had a specification right from the beginning of
2 that product, and I think that remained pretty much throughout
3 for absorbance at 350 nanometers. I think it was something
4 like 1.93 to 2.34 absorbance at 350 nanometers. So it was
5 always their task to keep the product in that range, but I'm
6 not sure whether they ever had to vary the amount of Tinuvin®
7 to do that, but I suspect they had a feed rate that they
8 thought was optimal but had to be adjusted at different points
9 in production."

10 "QUESTION: But as far as you know that specification
11 at 350 nanometers never changed from DuPont's perspective?

12 "ANSWER: Not that I'm aware of."

13 And that's all he said about the specs, other than it
14 talks about the dye and the Tinuvin® as UV absorbent and what
15 they're for. Okay? Go ahead.

16 MR. ALLEN: Okay. So just on number four where
17 they're faulting DuPont's 30(b)(6) deponent for not knowing
18 the formula of the Blue Base they're faulting Dr. Taylor, and
19 it's never been DuPont's position, and Dr. Taylor was not the
20 designated person to know that topic, and it has never been
21 DuPont's position even in Dr. Taylor's declaration that he
22 knows the exact formulation of other Cronar® bases. It has
23 just been Dr. Taylor's position that based on his work with
24 the 45 DPS plate that he knows the general structure of it,
25 including the fact that it had a Cronar® Blue Base, in part,

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1 because it was blue colored, and, second, he back exposed it
2 and it took 80 seconds for a back exposure, which indicated
3 that there was something going on with this Blue Base that was
4 different than the support layer used on a 67-gauge plate.

5 So at the end of the day I just submit that you should
6 disregard their point number 4 because that's not Dr. Taylor's
7 testimony.

8 THE COURT: Okay.

9 MR. ALLEN: On point number 5, this was -- you're
10 already reading it and getting to my next point on the Shock
11 testimony.

12 THE COURT: I'm sorry. I'm trying to follow you, but
13 what are the points?

14 MR. ALLEN: His reasons for denial. This would be
15 number 5. I don't have the slide number on me, but I can grab
16 it.

17 THE COURT: It will help me. I know you just get
18 these handouts when you arrive at oral argument.

19 MR. ALLEN: I think it is Page 29.

20 THE COURT: Okay.

21 MR. ALLEN: So reason for denial number 5.

22 THE COURT: Yes.

23 MR. ALLEN: On this point MacDermid makes an issue of
24 the manufacturing process changing. I would just like to
25 point out that Dr. Shock's testimony on this is also clear,

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1 that it changed for a specific purpose, that was to replace
2 the powder-fed method of feeding this Tinuvin® 900 into the
3 melt where you start mixing it up and then you extrude it, and
4 that's how you get your support layer. That was initially
5 powder fed, but they had some issues with that, so they moved
6 to putting the Tinuvin® 900 into a pellet form. And that's
7 all Dr. Shock's testifying to there that, as you pointed out
8 during Mr. Horvack's argument in that same paragraph
9 describing manufacturing process, change, again, Dr. Shock
10 unambiguously stated that Tinuvin® 900 was always in the
11 formulation.

12 THE COURT: I just read that. Okay.

13 MR. ALLEN: So going on to the procurement sheet,
14 which is their reason for denial number 6 and I think a few
15 more after that.

16 THE COURT: Yes.

17 MR. ALLEN: I think the important thing here and the
18 important reason why --

19 THE COURT: You're talking about the raw material
20 specification for use and procurement?

21 MR. ALLEN: Yes, Your Honor, that's correct.

22 THE COURT: Right.

23 MR. ALLEN: Exhibit K to the DuPont motion.

24 THE COURT: Right.

25 MR. ALLEN: So I think the point here and why I think

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1 that your interpretation of how to read that sentence is that
2 it is a blue, adhesive-coated 7 mil Cronar® polyester film
3 with a UV absorber in the film is just referred back to -- I
4 think they may have misquoted; I think you have to refer back
5 to the procurement record, Exhibit J. Actually, their
6 citation is wrong on their slide. So if you refer back to
7 Exhibit K of the Taylor declaration, which was the research
8 report for Cronar® from 1991, I just submit they cannot and
9 they have not attempted to reconcile their misplaced
10 interpretation of this procurement record with what is clearly
11 described in Exhibit K that this support layer had the UV
12 absorber in it inside the PET along with the blue dye and that
13 that Tinuvin® 900 is in the PET support layer and that the UV
14 adhesive actually had nothing in it -- sorry, not the UV
15 adhesive, the adhesive had nothing in it. There is no UV
16 absorber in the adhesive of this Cronar® 773x. And if you
17 read Exhibit K closely, you'll actually notice that the reason
18 they made Cronar® 773x was to replace their first attempt,
19 which was to put the UV-absorbing compound in the adhesive
20 layer, and they found that that failed miserably, that there
21 were pin holes, and there were problems with it, and they
22 realized let's put it in the actual support layer.

23 THE COURT: Stir it in there.

24 MR. ALLEN: Exactly. So that gets to my next point
25 on significant -- on their citation the one example in the

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1 Exhibit K document about significant UV variability. I don't
2 want to belabor on this point. Mr. Ossola made it clear, and
3 if you read the entire record it is very evident that was one
4 manufacturing run at the very beginning. They fixed it a
5 couple months later, and if you read through the whole
6 document there's several mentions of how this Tinuvin® 900 is
7 mixed uniformly, and there's even one that they want to really
8 highlight that the Tinuvin® 900 is dissolved in the polyester
9 melt, and "dissolved" is one of the words that's directly in
10 the uniformly distributed claim construction.

11 On Exhibit I their only argument here is pointing to
12 the -- this is Exhibit I to the Taylor declaration -- trying
13 to draw reasonable doubts about because the date that was
14 finally approved was February 8th, 1998 by management. You'll
15 notice there's other dates on that document. For example,
16 there's a writing completed of December 31st, 1997.

17 THE COURT: It says, "period of development
18 February 1994 to November 1997" for the digital plates.

19 MR. ALLEN: Exactly. So it is our position focusing
20 on this date is not the appropriate way to come at this. This
21 document is just a contemporaneous piece of evidence. Whether
22 or not it is after the December 31st date or after the
23 March 11th this document on its face is showing that around
24 this time that this was the support -- this was how the 45 DPS
25 plate was manufactured, and they haven't cited to any

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1 evidence. They site what could have been different or they
2 haven't shown any evidence of how it was different, so based
3 on this evidence here it seems reasonable to assume that all
4 45 DPS plates were manufactured in the method -- or with the
5 structure that's depicted in Exhibit I, and then we have
6 30(b)(6) testimony that backs that up from both Dr. Shock and
7 Dr. Taylor and Dr. Taylor's declaration.

8 With regard to Gore to highlight a few things here, I
9 think Gore, clear reading of it, turns it as a very special
10 case where there were pains taken to keep this manufacturing
11 process secret. Gore itself even acknowledges the Electric
12 Storage case that we rely on for why -- the use of a process
13 in the ordinary course of business to produce articles for
14 commercial purposes is a public use. Gore on -- sorry, I'm
15 missing the page -- I think at 1548 states, "The non-secret
16 use of a claim process in the usual course of producing
17 articles for commercial purposes is a public use." And it
18 cites Electric Storage for that. So Gore doesn't change the
19 law at all. And as Mr. Ossola shows you, there's a plethora
20 of evidence in the record showing that DuPont was not trying
21 to keep this process secret, that DuPont was making these
22 plates for printing customers, and the process was described
23 in brochures, operators' manuals. There's no reason for
24 DuPont to try to keep it a secret because they're trying to
25 sell these plates to customers and have them do the process

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1 themselves.

2 I missed one. On point number 10 or reason for
3 denial number 10 just real quickly here, we're not relying on
4 that plate itself that Dr. Taylor found. We're relying on the
5 support layer that was obtained from it, and to confirm that
6 that support layer was a reliable representative support layer
7 of the support layers that were used on these invalidating 45
8 DPS cells and on use -- public use exceptions that Dr.
9 Henderson took it off and he tested the UV absorbance, he
10 found it was within the spec. So the support layer is just
11 corroborating other aspects of the evidence that we have
12 offered.

13 And then finally the last two points, I'll make these
14 as quick as possible. Regarding the Taylor declaration, first
15 of all, Taylor is more than a credible witness. They have
16 tried to imply that Dr. Taylor didn't know anything about the
17 45 DPS plates, that all he did was process these plates, but
18 if you look at Dr. Taylor's declaration -- this is in our
19 reply brief -- he did more than just process plates. This was
20 specifically in Paragraphs 5 and 6 of his -- or Paragraph 6 of
21 Taylor's declaration. He did things like support the
22 installation as to the CDI at customer facilities in the
23 United States and abroad, including the training of these
24 customers on the digital work flow. It is just one example of
25 numerous ways that Dr. Taylor was more than just a technician

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1 processing these plates. He was actually involved in the
2 development and commercialization of these plates and had a
3 reason to know the structure of these plates, which is
4 evidenced by Exhibit H to the Taylor declaration where Dr.
5 Taylor is actually sent from Germany details on certain
6 batches of the 45 DPS plate that describe some of the
7 formulation characteristics. So Dr. Taylor is clearly in a
8 position to know what the structure of the 45 DPS plate was.

9 And then the two pieces of evidence they tried to use
10 to discredit Dr. Taylor's testimony I would just like to
11 clarify for the record, and, most importantly, is Exhibit F to
12 the Taylor declaration, which is the sales record -- or the
13 sales brochure for the 45 DPS. Exhibit F.

14 THE COURT: The F that I have is it talks about the
15 plate, not the machine.

16 MR. ALLEN: Yes, that's a brochure for 45 DPS, and
17 this is the exhibit that Mr. Horvack relied on to show that
18 there's no explanation of a back exposure step. If you can go
19 to the Bates number 1109 and look at the table at the top, and
20 there's a column for image reproduction.

21 THE COURT: It is a section. It is not a column.

22 MR. ALLEN: Section. And there's an item labeled
23 "relief depth," and it says, "20 to 35 mil recommended
24 dependent on back exposure," so Exhibit F was teaching a back
25 exposure step.

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1 THE COURT: And this was to be read along with the
2 machine information, right?

3 MR. ALLEN: Yes. My understanding is this was just a
4 marketing brochure.

5 THE COURT: Digital imaging systems, and are designed
6 for use with the Cyrel Digital Imager. That's the half
7 million dollar machine.

8 MR. ALLEN: Yes, Your Honor, that's correct.

9 THE COURT: Then we have the instructions for that,
10 which is you back expose, as well as front expose, right?

11 MR. ALLEN: Yes, Your Honor. The Cyrel Digital
12 Imager is the special piece of equipment that you need to do
13 the digital work flow. It does the laser ablation step, and
14 then you use the other equipment like the exposure banks;
15 those are used in both analog and digital, so you only have to
16 buy one new piece of equipment, but it was a half a million
17 dollars.

18 THE COURT: That only does the laser ablation?

19 MR. ALLEN: Yes, Your Honor, that's correct.

20 THE COURT: I thought it was like the complete
21 washing machine; you know, it had a wash cycle, a spin cycle,
22 and a rinse cycle.

23 MR. ALLEN: I'm sure somebody has tried to do
24 everything in one. But, yes, it just does laser ablation.
25 And then they also tried to discredit Dr. Taylor's testimony

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1 by relying on a couple examples in Exhibit G, which is that
2 very dense spread sheet that lists the processing details.
3 And they pointed to the Bates number 375389 and highlighted
4 that it was a 20-second back exposure for a presumably 45 DPS
5 plate.

6 Just two quick points. If you look at the rest of that
7 record there's a thickness that's highlighted at .067 inches
8 right below.

9 THE COURT: So it is not a plate at all?

10 MR. ALLEN: It is actually just a typo. The 45 DPS,
11 it should have said 67 DPS, and that can be confirmed by going
12 back to Exhibit H of Taylor's declaration. It talks about
13 this batch and specifically describes it as a 67 thickness.

14 THE COURT: Actually a 67, right?

15 MR. ALLEN: Yes, Your Honor.

16 THE COURT: DPS 67, what is it called?

17 MR. ALLEN: 67 DPS.

18 THE COURT: All right. Fine.

19 MR. ALLEN: And then finally on Claim 27, I won't
20 belabor too many points here, but I just want to direct your
21 attention to our response to their statement of facts
22 concerning Dr. Shock's alleged copying of Dr. Kanga's work. I
23 think you'll find there that if you were to read that that we
24 clearly show how they misrepresent Dr. Shock's testimony, take
25 snippets of this record and don't look at everything, and it

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1 is clear that Dr. Shock only turned to Melinex after he had
2 already been working with Cronar®, that his program began by
3 trying to improve upon Cronar®, and it came to Melinex later.

4 And then as far as their alleged copying, their
5 documents showing this copying dated 2000 and 2002. The
6 evidence we're relying on as far as Dr. Shock's conception of
7 the idea to put a 5-mil UV-absorbing support layer on a
8 67-gauge product, that document was written in 1998. So how
9 copying -- how Dr. Shock could copy an idea he formed in 1998
10 from evidence that's 2000 at best is unclear.

11 And I think that hits all of my points. Do you have
12 any questions for me?

13 THE COURT: No, not at this hour.

14 MR. ALLEN: Thank you, Your Honor.

15 THE COURT: Thank you very much, Mr. Allen. Thank
16 you everybody. I'm going to deny this motion for summary
17 judgment. I do deny the motion for summary judgment. DuPont
18 has adduced an array of documentation and some contemporaneous
19 testimony going to its claim that it had for sale and in use
20 the product and the method reflected in the '835 patent, but
21 DuPont's case on this issue -- because it has the burden of
22 proof by clear and convincing evidence on this issue even
23 though it is a defense -- DuPont's case rests upon inferences
24 that must be drawn from the documentation, and the inferences
25 are based partly on an appeal to logic and reason, partly upon

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1 attorney argument, and largely upon testimony that they have
2 from persons with relevant knowledge, as well as one expert.

3 But the summary judgment standard is that you're
4 supposed to draw all the inferences -- all reasonable
5 inferences in favor of the non-moving party, and there are
6 enough reasonable inferences, maybe not all, but enough
7 reasonable inferences in favor of the non-moving party on this
8 very voluminous record of which I feel is only the tip of the
9 iceberg that I have seen that I think that it would be legally
10 inappropriate for this Court to grant summary judgment in
11 favor of DuPont on any of these claims based upon their
12 arguments presented at this motion primarily because it is
13 very difficult to say with assurance that no reasonable jury
14 could fail to find by clear and convincing evidence that the
15 support layer that was in the documented sales in 1997 and
16 1998 was the support layer that the documentation of DuPont
17 seems to indicate was a support layer that could satisfy the
18 claims that are asserted by MacDermid against DuPont in this
19 case.

20 I could go line by line by line, but I'm not going to.
21 If I were going to grant this motion for summary judgment,
22 that would be our task, but I have -- as you can tell I have
23 very, very carefully reviewed this record and your arguments
24 before you came here today. I came armed with as much
25 comprehension as I could develop based upon the materials that

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1 I had. And I have listened carefully to the oral argument,
2 and I can envision what the summary judgment opinion would
3 look like, and I could not write one that would satisfy me or,
4 I think, an appeals court that giving all reasonable
5 inferences in the favor of the non-moving party no reasonable
6 jury could find by clear and convincing evidence, other than
7 that the product existed at that time.

8 So we will go forward to trial on this claim. I am
9 specifically not addressing the Gore issue in this oral ruling
10 because I will have to see what the appropriate legal
11 instruction to the jury would be, and I will refine my legal
12 analysis on that -- what we have referred to as the Gore
13 issue, how much of a disclosure of your product do you have to
14 make in -- or is it method? Whichever. You have to make in
15 order to make it a public use.

16 And I'm also not going to address Claim 27 on the basis
17 of obviousness because obviousness is still in the case on the
18 broader picture as we have been told today, and since I can't
19 see my way clear to say that Claim 27, which is dependent is
20 barred by any ruling that I could make today on its
21 independent claim, Claim 24 then I don't think I have to get
22 to Claim 27 in ruling on this summary judgment motion today.

23 This has been very useful both in the preparation
24 that you've provided and in the arguments that you have
25 presented to the Court, and I just think that it's going to be

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1 quite interesting to see how we shape this for a jury and what
2 they do with it. And as I have already said, I am not one who
3 grants a judgment as a matter of law in the middle of a trial.
4 If need be, if either party demands that I set aside a verdict
5 based upon your presentation of a full record at trial I will
6 deal with it then, and I will deal with it line by line as
7 necessary.

8 Thank you all very much.

9 MR. ROBINSON: Does Your Honor want a formal order
10 presented?

11 THE COURT: We'll do the order. We'll just say for
12 the reasons stated on the record the motion is denied, and
13 that means, of course, it is denied without prejudice to being
14 renewed at trial. Okay. We're already more than ready to
15 quit for the day, but I would like you to talk to the
16 courtroom deputy off the record about how much time we might
17 need for the motion pending in the companion case by DuPont
18 against MacDermid with docket number 06-2383. I had to
19 postpone oral argument that we had scheduled for last week,
20 and I only did it because of circumstances right here at
21 court, and I'll put you back on at your immediate early
22 convenience. You don't have to worry about that. We do need
23 to know how much time to set aside for it, and you can talk to
24 her about that.

25 Are we ready to adjourn for the day?

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1 MR. ROBINSON: We are, indeed.

2 THE COURT: Thank you all very much. Take care.

3 (End of proceedings at 5:45 p.m.)

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